CONTENTS

CASES CITED

STATUTES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 150

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY Company, The Michigan Central Railroad Company, The New York, Chicago and St. Louis Railroad Company (successor by consolidation to the Lake Erie and Western Railroad Company), and The Pere Marquette Railway Company, appellants

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE Commission, appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA

BRIEF FOR THE UNITED STATES

OPINIONS

Circuit Judge Alschuler and District Judges Anderson and Lindley denied application for interlocutory injunction without opinion (R. 62). The Interstate Commerce Commission report is *Chicago, Lake Shore & South Bend Railway* v. *Lake Erie & Western Railway, et al.*, 88 I. C. C. 525.

JURISDICTION

The suit was commenced and the appeal was taken under Commerce Court Act, 36 Stat. 539, and Urgent Deficiencies Act, 38 Stat. 219, 220. The latter provides, "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction * * *."

STATEMENT

The controversy before the Commission was between carriers which operate in the Michigan City switching district. (R. 11, 23.) Chicago Lake Shore & South Bend (South Shore) was the complainant before the Commission; and Michigan Central, Chicago, Indianapolis & Louisville (Monon), Pere Marquette, and Lake Erie & Western were the defendants.

The South Shore, an electric line of 76 miles operating between South Bend, Ind., and Kensington, Ill., a point within the corporate limits of Chicago, complained to the Commission of the refusal of the steam railroads operating in Michigan City switching district to enter into reciprocal switching arrangements with South Shore while maintaining such relations with each other. The Michigan City Chamber of Commerce and the Manufacturers' Club of Michigan City intervened in support of the complaint. (R. 22.)

The South Shore was fully described and its status defined in *Chicago, Lake Shore & South*

Bend Railway v. *Director General,* 58 I. C. C. 647.

South Shore has connection and interchange facilities with the Lake Erie & Western only. The Lake Erie & Western directly connects with the Michigan Central and the Monon. (R. 22.) The Monon connects with the Pere Marquette, Lake Erie & Western, and Michigan Central, and acts as an intermediate line for the interchange of freight between points on Pere Marquette, on the one hand, and points on Lake Erie & Western and Michigan Central on the other. (R. 22.) Lake Erie & Western and Michigan Central do not connect with Pere Marquette, and Michigan Central, Pere Marquette and Monon do not connect with South Shore. (R. 22.)

The switching charges and practices of the various roads operating in the switching district are set out in the report. (R. 23.) Lake Erie & Western is necessarily an intermediate carrier of traffic which may move between the line of South Shore and the lines of the other three. (R. 23.)

Lake Erie & Western has entered into reciprocal switching arrangements with South Shore. (R. 23.) Its interchange switching charges between its connections with Michigan Central, Monon, or South Shore, are $3.60 to certain industries on its line, and $6.30 to certain other industries. It does not publish an intermediate switching charge applicable on traffic between its connection with the South Shore and its connections with

the Michigan Central and the Monon. (R. 23.) The Michigan Central, Pere Marquette, and Monon tariffs make no provision for reciprocal switching with the South Shore. (R. 24.)

The proceeding before the Commission sought to compel Michigan Central, Pere Marquette and Monon to enter into reciprocal switching arrangements with the South Shore, upon the same terms and conditions as exist between those lines. (R. 23.)

The terminals of Michigan Central, Lake Erie & Western, Pere Marquette, and Monon are open except to the South Shore. (R. 27.) Except the Lake Erie & Western, the rail carriers do not switch traffic to industries on the South Shore, or from the South Shore to industries located on their rails. (R. 24.) There are three industries located on South Shore's line at Michigan City, two of which have practically no outbound tonnage and their inbound consists chiefly of coal, ice, and groceries. (R. 24.) One is located on both South Shore and Monon. There are about 60 industries located on the other lines. (R. 24.)

Witnesses for the industries testified it would be to their advantage if the South Shore had reciprocal switching arrangements with all the steam lines at Michigan City. (R. 24–25.) Six shippers located on the rails of the Monon, Michigan Central, and Pere Marquette testified that they have used the South Shore for less-than-carload traffic and have received very efficient and expeditious serv-

ice, in many instances superior to that of the steam roads. (R. 25.) If reciprocal switching arrangements were in effect and if the carload service were as good as the less-than-carload service they would divert a portion of their carload traffic from the steam lines to the South Shore. (R. 25.) The service rendered by the steam lines has on the whole been satisfactory during the past year. (R. 25.)

During 1921, when reciprocal switching arrangements were in effect between Lake Erie & Western and South Shore, the latter handled into Michigan City 162 cars which were switched to industries on Lake Erie & Western; of this number 29 cars were consigned to South Shore's power house prior to October, and during the remainder of the year 72 cars were switched to a company distinct from the South Shore which had leased its power house. Thus, 101 of the total of 162 cars were loaded with coal for the power house which prior to October was controlled by South Shore. In the same year South Shore switched 17 cars to industries on its line from Lake Erie & Western. (R. 25.)

The establishment of reciprocal switching from or to the South Shore to or from Pere Marquette would require three interchanges, and to or from the Michigan Central or Monon two interchanges. (R. 27.) Under the existing reciprocal switching arrangements between the steam lines only the movements between the Pere Marquette and the Lake Erie & Western or Michigan Central require two interchanges. (R. 27.)

The fact that the Lake Erie & Western will be required, if reciprocal switching is maintained, to act as an intermediate carrier of traffic to or from South Shore is an accident of location and not a transportation difference. (R. 28.) In length of haul or use of intermediate line the situation of the South Shore with respect to the Michigan Central or the Monon is clearly not dissimilar from the situation of the Pere Marquette with respect to the Michigan Central or the Lake Erie & Western. (R. 28.) Nor is the fact controlling that three interchanges and a somewhat longer intermediate haul may be required on traffic to or from Pere Marquette. Each carrier holds itself out to switch practically all traffic of any other carrier, regardless of the length of the switching haul or point of origin or destination of shipment. The contemporaneous refusal to switch traffic of South Shore is a denial to it of reasonable, proper, and equal facilities for the interchange of traffic. (R. 28.)

The order (R. 30) directs the carriers operating in the Michigan City switching district to cease and desist, on or before July 24, 1924, and thereafter to abstain, from the unjust discrimination and undue prejudice found in said report to result from their refusal to switch interstate carload traffic moving over South Shore's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point, and from their failure and refusal to enter into arrangements for the performance of reciprocal

switching of interstate carload traffic in connection with complainant at Michigan City, Ind., upon relatively reasonable terms based upon a careful consideration of similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in arrangements with each other at that point.

Assailing the validity of the order as beyond the power of the commission, appellants filed the petition. (R. 1.) Answers were filed by the Government (R. 56) and the Commission (R. 53). The South Shore intervened (R. 33) and filed an answer in support of the order (R. 35). Michigan City Chamber of Commerce and Manufacturers Club of Michigan City also filed a joint petition for intervention in support of the order. (R. 51.)

STATUTES

Section 404 of the Transportation Act of 1920 (41 Stat. 479) amended Section 2 of the act to regulate commerce (24 Stat. 379), so that Section 2 now provides:

> That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the

provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (41 Stat. 479.)

Section 405 of the Transportation Act of 1920 (41 Stat. 479) amended Section 3 of the act to regulate commerce (24 Stat. 380), so that Section 3 now provides:

That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, or corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (24 Stat. 380.)

* * * * *

All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or prop-

erty to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper. (41 Stat. 479.)

Section 418 of the Transportation Act of 1920 (41 Stat. 484) amended Section 15 of the Act to regulate commerce (24 Stat. 384), so that Section 15 now provides:

> That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the tranmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this

Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter ob-observed in such case or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulations, or practice is or will be just, fair, and reasonable, to be thereafter followed and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

QUESTION

Does the effect of the noninclusion of the South Shore in the arrangements entered into for reciprocal switching of interstate carload traffic by the carriers operating in the Michigan City switching district constitute, under the findings of the Commission, the unjust discrimination and undue prejudice condemned by the Statute?

ARGUMENT

SUMMARY

I. Chicago, Lake Shore & South Bend Railway Company is a common carrier subject to the Interstate Commerce Act and entitled to all of the benefits and advantages it may derive therefrom. 58 I. C. C. 647; 69 I. C. C. 180; *United States* v. *Village of Hubbard; United States* v. *City of Wellsville,* 266 U. S. 474.

II. To open their terminals to each other and close them to the South Shore in their arrangements for the performance of reciprocal switching, the carriers operating in the Michigan City switching district have practiced unjust discrimination and undue prejudice against South Shore and its traffic. *United States* v. *Pennsylvania Railroad,* 266 U. S. 191; *Louisville & Nashville Railroad* v. *United States,* 238 U. S. 1; *Seaboard Air Line Railway* v. *United States,* 254 U. S. 57; *Pennsylvania Company* v. *United States,* 236 U. S. 351; *Los Angeles Switching Case,* 234 U. S. 294.

III. The order does not require carriers "to extend or curtail their facilities, or to submit to enlarged use of their terminals," an argument overruled in York Switching Case, *United States* v. *Pennsylvania Railroad,* 266 U. S. 191, 197. But see, *Louisville & Nashville Railroad* v. *United States,* 242 U. S. 60.

IV. The argument that unlawful discrimination cannot exist unless there is a physical connection by the carrier alleged to be guilty of the discrimination

with the railroad or shipper claimed to be discriminated against was overruled in *St. Louis Southwestern Railway* v. *United States,* 245 U. S. 136, and the latter decision was not impaired by the subsequent decision in *Central Railroad* v. *United States,* 257 U. S. 247, 259.

V. In the absence of the evidence before the Commission the only question to be considered is whether the findings on their face support the order. *Louisiana & Pine Bluff Railway* v. *United States,* 257 U. S. 114.

I

THE NONINCLUSION OF THE SOUTH SHORE IN THE ARRANGEMENTS ENTERED INTO FOR RECIPROCAL SWITCHING OF INTERSTATE CARLOAD TRAFFIC BY THE CARRIERS OPERATING IN THE MICHIGAN CITY SWITCHING DISTRICT CONSTITUTES, UNDER THE FINDINGS OF THE COMMISSION, THE UNJUST DISCRIMINATION AND UNDUE PREJUDICE CONDEMNED BY THE STATUTE

(A) THE SOUTH SHORE IS A COMMON CARRIER SUBJECT TO THE INTERSTATE COMMERCE ACT

In their brief (p. 48) the faint contention is made that the South Shore is not included within the term "common carriers by railroad." The status of the South Shore was fully defined in *Chicago, Lake Shore & South Bend Railway* v. *Director General,* 58 I. C. C. 647. Its president testified that there has been no important change in the construction or operation of its lines since that decision. (R. 22.)

It does not appear that the prior report and order of the Commission which adjudged that the

South Shore was such a common carrier was ever questioned by any carrier operating in the Michigan City switching district; nor is there any charge or averment in the petition that the South Shore is not such a common carrier; nor was such a question raised before and passed upon by the District Court when the application for injunction was denied, at least no error is assigned on such a ruling. Moreover, the question is foreclosed by the decision in the recent cases of *United States* v. *Village of Hubbard* and *United States* v. *City of Wellsville,* 266 U. S. 474.

(B) THE ORDER DOES NOT REQUIRE CARRIERS TO EXTEND OR CURTAIL THEIR FACILITIES OR TO SUBMIT TO ENLARGED USE OF THEIR TERMINALS

No claim is made by the carriers operating in the Michigan City switching district that the order, directly or indirectly, compels them to surrender to the South Shore the use, in any respect whatsoever, of their terminals or any part thereof. The order merely directs that those carriers shall extend to the South Shore the same reciprocal switching or interchange facilities that they extend to each other, and merely admits the South Shore to the reciprocal switching or interchange facilities which now exist, the only change wrought being that such facilities shall be accorded to five carriers instead of four. The situation in this case is unlike that which was presented in *Louisville & Nashville Railroad* v. *United States,* 242 U. S. 60.

(C) THE ORDER AND THE FINDINGS UPON WHICH IT IS BASED ARE SUBSTANTIALLY SIMILAR TO THOSE IN OTHER CASES

In its report (R. 28) the Commission found, "In length of haul or use of intermediate line the situation of the South Shore with respect to the Michigan Central or the Monon is clearly not dissimilar from the situation of the Pere Marquette with respect to the Michigan Central or the Lake Erie & Western. Nor is the fact controlling that three interchanges and a somewhat longer intermediate haul may be required on traffic to or from the Pere Marquette. Each defendant holds itself out to switch practically all traffic of any other defendant, regardless of the length of the switching haul or point of origin or destination of shipment. The contemporaneous refusal to switch traffic for complainant is a denial to it of reasonable, proper, and equal facilities for the interchange of traffic."

In the absence of the evidence before the Commission this finding must be accepted as true. *Louisiana & Pine Bluff Railway* v. *United States,* 257 U. S. 114.

In *Pennsylvania Co.* v. *United States,* 236 U. S. 351, this Court affirmed the decree of the District Court, 214 Fed. Rep. 445, which denied motion for interlocutory injunction against the order of the Commission in *Buffalo, Rochester & Pittsburgh Railway* v. *Pennsylvania Co.,* 29 I. C. C. 114, cited by the Commission in the instant case. (R. 28.) In

delivering the opinion of the Court, Mr. Justice Day said (p. 371):

> So here there is no attempt to appropriate the terminals of the Pennsylvania Company to the use of the Rochester Company. What is here accomplished is only that the same transportation facilities which are afforded to the shipments brought to the point of connection over tracks used in common by the Baltimore & Ohio Railroad and the Rochester Company, shall be rendered to the Rochester Company as are given to the Baltimore & Ohio Company under precisely the same circumstances of connection for the transportation of interstate traffic. All that the Commission ordered was that the Company desist from the discriminatory practice here involved, and in so doing we think it exceeded neither its statutory authority nor any constitutional limitation, and that the District Court was right in so determining.

In *Seaboard Airline Railway* v. *United States,* 254 U. S. 57, this Court affirmed the decree of the District Court, 249 Fed. Rep. 368, which denied application for injunction and dismissed the petition, in the suit to enjoin the order of the Commission in *Richmond Chamber of Commerce* v. *Seaboard Airline,* 44 I. C. C. 455, also cited by the Commission in the instant case. (R. 28.) In delivering the opinion of the Court Mr. Justice Day said (p. 62):

> We are of opinion that the Commission was correct in regarding the service

in question as a like and contemporary service rendered under substantially similar circumstances and conditions, and amply sustained as matter of law in *Wight* v. *United States*, 167 U. S. 512, and *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144. The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions, and that the exigencies of competition do not justify discrimination against shippers for substantially like services.

Moreover the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88; *Pre-Cooling Case*, 232 U. S. 199; *Los Angeles Switching Case*, 234 U. S. 294, 311, 312, and cases cited; *Pennsylvania Company* v. *United States*, 236 U. S. 351, 361.

The Commission did not hold that switching charges must be always the same. But it did hold that they must be alike where the service was rendered under substantially similar circumstances and conditions.

On April 2, 1924, the order sought to be enjoined was entered by the Commission. (R. 21.) On June 24, 1924, the petition for injunction was filed in the District Court. On July 8, 1924, the application for interlocutory injunction was denied and the order allowing the appeal was entered on the same day. On August 1, 1924, the record was filed in this Court.

In *United States* v. *Pennsylvania Railroad*, 266 U. S. 191, the arguments were made before this Court in October, 1924, and the decision was announced on November 17, 1924. Thus, the *York Switching Case* had not been decided by this Court when the Commission entered its order and the District Court denied application for interlocutory injunction. In affirming the decree of the District Court in the *York Switching Case,* Mr. Justice Brandeis said (p. 199):

> The Commission has found, not merely that the facilities in question were granted to some and refused to others, but that the grant and refusal have, by reason of the use made and intended to be made of the facilities, resulted in undue prejudice. It is true that an extension of trackage rights, an enlarged common use of terminals, or the establishment of through routes and joint rates, or the withdrawal of any of them, could not be ordered except upon the findings and conditions prescribed in the act. But the order complained of does not require any such thing. It requires only that the carriers shall desist from a practice which involves

such use as has resulted and will result in the undue prejudice found. The order leaves them free to remove the discrimination by any appropriate action. *American Express Co.* v. *Caldwell,* 244 U. S. 617, 624; *United States* v. *Illinois Central R. R. Co.,* 263 U. S. 515, 521. To accomplish this, it is not necessary that the Pennsylvania should grant to the other carriers the extensive use of the terminal facilities and tracks which was sought, and which the Commission found was not shown to be in the public interest. Compare *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 368; *Louisville & Nashville R. R. Co.* v. *United States,* 238 U. S. 1, 20.

(D) IT IS NOT NECESSARY THAT THE TRACK OF SOUTH SHORE SHALL PHYSICALLY CONNECT WITH THE TRACK OF EACH OF THE OTHER CARRIERS

Opposing counsel argue at length that, under the decision in *Central Railroad* v. *United States,* 257 U. S. 247, the order of the Commission may not stand because the track of the South Shore does not physically connect with the track of each of the other carriers and, therefore, the charge of unjust discrimination and undue prejudice is unfounded.

In *St. Louis Southwestern Railway* v. *United States,* 245 U. S. 136, that argument was vigorously pressed and squarely overruled. In delivering the opinion of the Court, Mr. Justice Brandeis said (p. 144):

> Carriers insist also that the order is void on the ground that, since their " rails do not reach Paducah, they cannot be guilty of discrimination against that city." They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose " rails " reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission, supra.*

In *Central Railroad* v. *United States,* 257 U. S. 247, this Court said nothing which impaired the foregoing language; on the contrary, the Court cited the *St. Louis Southwestern case* with approval. In delivering the opinion, Mr. Justice Brandeis said (p. 259):

> It is urged that, while the undue prejudice found results directly from the individual acts of southern and midwestern carriers in granting the privilege locally, the appellants, as their partners, make the prejudice possible by becoming the instruments through which it is applied. Discrimination may, of

course, be practiced by a combination of connecting carriers as well as by an individual railroad; and the Commission has ample power under Section 3 to remove discrimination so practiced. See *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144.

(E) THE FACT THAT THE SOUTH SHORE MAY ACQUIRE TRAFFIC WHICH THE APPELLANTS ARE NOW HANDLING AND THAT THE ACQUISITION OF SUCH TRAFFIC WAS THE PURPOSE OF THE COMPLAINT DOES NOT RENDER THE ORDER NULL AND VOID

In *United States* v. *Illinois Central Railroad*, 263 U. S. 515, this Court, again speaking through Mr. Justice Brandeis, and again citing *St. Louis Southwestern Railway* v. *United States*, 245 U. S. 136, with approval, said (p. 523):

> The effort of a carrier to obtain more business, and to retain that which it had secured, proceeds from the motive of self-interest which is recognized as legitimate.

CONCLUSION

The decree of the District Court was correct and should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

JANUARY 2, 1926.

O

SUBJECT INDEX

TABLE OF CASES CITED

70648—25——1

STATUTES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 150

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY Company, The Michigan Central Railroad Company, The New York, Chicago & St. Louis Railroad Company, and The Pere Marquette Railway Company, appellants

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE Commission, and the Chicago, Lake Shore & South Bend Railway Company, appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA

BRIEF FOR INTERSTATE COMMERCE COMMISSION

OPINION OF THE COURT BELOW

There was no written or reported opinion of the court below.

STATEMENT OF THE CASE

This is an appeal under the Act of October 22, 1913 (38 Stat. L. 208, 220), from a decree of the District Court for the District of Indiana, consisting of Circuit Judge Alschuler and District Judges

Anderson and Lindley, denying an application by four steam railroads for an interlocutory injunction to set aside an order of the Interstate Commerce Commission requiring them to remove unjust discrimination and undue prejudice found by the Commission to exist in their refusal to interchange traffic with an electric railroad at Michigan City, Ind., and to enter into reciprocal switching arrangements with it while at the same time interchanging traffic and having reciprocal switching arrangements with each other at that point.

The four steam railroads, appellants herein, are Chicago, Indianapolis & Louisville Railroad Company, The Michigan Central Railroad Company, The New York, Chicago & St. Louis Railroad Company, successor by consolidation to the railroad of the Lake Erie & Western Railroad Company, and The Pere Marquette Railway Company. These for convenience will be referred to, respectively, as the Monon, the Michigan Central, the Lake Erie & Western, and the Pere Marquette. The Michigan Central and the Pere Marquette operate railroads extending from Chicago through Michigan City to points east thereof, while the Monon and the Lake Erie & Western operate lines extending southward from Michigan City to points in other states. (R. 1, 2.)

The electric railroad is the Chicago, Lake Shore & South Bend Railway Company, referred to herein as the South Shore. This railroad is about 76 miles long and extends from Kensington, with-

in the corporate limits of Chicago, Ill., through Michigan City to South Bend, Ind. (R. 22.) It connects with the Illinois Central Railroad at Kensington and has with that road joint rates and through routes under which the electric line handles a large part of its traffic to Michigan City. (R. 25, 26.) There it connects with the Lake Erie & Western, but has no direct physical connection with the other three steam railroads. Traffic between the South Shore and the Monon or the Michigan Central must be switched at Michigan City over the Lake Erie & Western as an intermediate line, and traffic between the South Shore and the Pere Marquette must be switched there over both the Lake Erie & Western and the Monon as intermediate lines. (R. 22.) The location of the electric line, the steam railroads, and their points of connection is indicated on the map attached as Exhibit D to the petition. (R. 31.)

PROCEEDINGS BEFORE THE COMMISSION

Originally the South Shore had no arrangements for the interchange of traffic or for reciprocal switching with any of the steam lines at Michigan City. However, in a proceeding which antedated the one in which the order here under consideration was entered, the Commission, upon complaint of the South Shore, "directed the Lake Erie & Western to enter into reciprocal switching arrangements at Michigan City with the South Shore to the same extent and upon the same terms and

conditions as those upon which it participates in such an arrangement at that point in connection with the Pere Marquette or the Monon." *Chicago, L. S. & S. B. Ry. Co.* v. *Director* General, 58 I. C. C. 647. (R. 23.) The Lake Erie & Western thereupon entered into reciprocal switching arrangements with the South Shore as to traffic to or from its own line, but did not handle any traffic between the South Shore on the one hand and the other steam railroads at Michigan City on the other. The other steam roads were not parties to this order (58 I. C. C. 647, 650) and refused to interchange traffic or establish reciprocal switching arrangements with the South Shore in that city. (R. 23.)

The proceeding which resulted in the order here under consideration arose upon complaint of the South Shore against the practice of the steam roads in thus refusing to switch traffic and establish reciprocal switching arrangements with it while switching traffic for, and having such arrangements with, each other at Michigan City. The four steam railroads, appellants herein, were made parties defendant to the proceeding. The Michigan City Chamber of Commerce and the Manufacturers' Club of Michigan City intervened in support of the complaint. (R. 22.) A full hearing was held, briefs were filed, and the case was orally argued. (R. 55.) On April 2, 1924, the Commission, by Division 3, made its report (R. 21) and entered its order (R. 30) in the proceeding. *Chi-*

cago, L. S. & S. B. Ry. Co. v. *L. E. & W.*, 88 I. C. C. 525.

The report. In the report the Commission described the location of appellants' lines with respect to the South Shore, as follows:

> At Michigan City the South Shore has a connection and interchange facilities with the Lake Erie & Western. The Lake Erie & Western also connects directly with the Monon and the Michigan Central. The Monon connects with the Pere Marquette, Lake Erie & Western, and Michigan Central, and acts as an intermediate line for the interchange of freight between points on the Pere Marquette on the one hand and points on the Lake Erie & Western and the Michigan Central on the other. The Lake Erie & Western and Michigan Central do not connect with the Pere Marquette, and the Michigan Central, Pere Marquette, and Monon do not connect with the South Shore. * * * (R. 22.)
>
> The establishment of reciprocal switching from or to the South Shore to or from the Pere Marquette would require three interchanges, and to or from the Michigan Central or the Monon, two interchanges. Under the existing reciprocal switching arrangements between the steam lines, only the movements between the Pere Marquette and the Lake Erie & Western or the Michigan Central require two interchanges. * * * (R. 27.)

The intermediate switching distance between the rails of the South Shore and the rails of the Pere Marquette is, as the Commission found, 3.88 miles; between the rails of the South Shore and the rails of the Michigan Central, 1.38 miles; and between the rails of the South Shore and the rails of the Monon, 1.76 miles. In contrast with this it found the intermediate switching distance between the rails of the Lake Erie & Western and the Pere Marquette to be 2.12 miles, and between the rails of the Michigan Central and the Pere Marquette 0.49 miles when delivery is to the Michigan Central and 1.36 miles when delivery is to the Pere Marquette. (R. 27, 28.)

With respect to the industries located at Michigan City the Commission said:

> There are three industries located on complainant's line at Michigan City and about 60 industries located on the lines of defendants. Two of the industries on the South Shore have practically no outbound tonnage and their inbound freight consists chiefly of coal, ice, and groceries. One of these was located on the Lake Erie & Western rails until December, 1921. The other is located on the Monon as well as on the South Shore, and receives groceries by the electric line and coal via the Monon. The Monon track beside the coal bins is from 50 to 60 feet from the warehouse. These industries compete with industries on the steam roads. The third industry receives and ships in carload and less-than-carload quantities. It is

located on the South Shore a short distance from the point where that line is intersected by the Lake Erie & Western tracks. It was formerly served by the Lake Erie & Western, whose right of way extends to the fence inclosing the industry's property.

Witnesses for the above industries testified that it would be to their advantage if the South Shore had reciprocal switching arrangements with all the steam lines at Michigan City. Under the present arrangement they are required to receive traffic transported to Michigan City by the Michigan Central and Pere Marquette on the steam tracks of those roads, and in some instances above referred to they have been required to pay an additional switching charge. Six shippers located on the rails of the Monon, Michigan Central, and Pere Marquette testified that they have used the South Shore for less-than-carload traffic and have received very efficient and expeditious service, in many instances superior to that of the steam roads. If reciprocal switching arrangements were in effect and if the carload service were as good as the less-than-carload service they would divert a portion of their carload traffic from the steam lines to the South Shore. The service rendered by the steam lines has, on the whole, been satisfactory during the past year. Several shippers located on defendants' lines at Michigan City, including some of the largest shippers of both inbound and outbound freight, testified that the service afforded by the

> steam lines is entirely adequate, and that they would not be benefited by the establishment of the reciprocal switching arrangements with the electric line. (R. 24, 25.)

Concerning the refusal of appellants to accord to the South Shore the treatment which they gave to each other in respect to switching, the Commission said:

> Defendants, except the Lake Erie & Western, do not switch traffic to industries on the South Shore or from the South Shore to industries located on their rails. * * * Company material consigned to the South Shore is switched over the defendants' lines and the charges are absorbed because the South Shore is named as an industry in the defendants' tariffs. (R. 24.)

The Lake Erie & Western, as previously indicated, established, under a prior order of the Commission, reciprocal switching arrangements with the South Shore in respect to traffic to or from its own line, but did not handle traffic between the South Shore and the other steam lines. As to the latter traffic the Lake Erie & Western " is necessarily an intermediate carrier." It can not " because of its location act as an intermediate carrier between any of the steam roads at Michigan City." (R. 23.) In dealing with this situation the Commission said:

> The fact that the Lake Erie & Western will be required, if reciprocal switching is maintained, to act as an intermediate car-

> rier of traffic to or from complainant's line is an accident of location and not a transportation difference. In length of haul or use of intermediate line the situation of the South Shore with respect to the Michigan Central or the Monon is clearly not dissimilar from the situation of the Pere Marquette with respect to the Michigan Central or the Lake Erie—Western. Nor is the fact controlling that three interchanges and a somewhat longer intermediate haul may be required on traffic to or from the Pere Marquette. Each defendant holds itself out to switch practically all traffic of any other defendant, regardless of the length of the switching haul or point of origin or destination of shipment. The contemporaneous refusal to switch traffic for complainant is a denial to it of reasonable, proper, and equal facilities for the interchange of traffic. (R. 28.)

The Commission sets forth in the report the charges published by the steam lines and the South Shore for switching at Michigan City, and describes the tariff provisions under which appellants absorb switching charges for each other and not for the South Shore. (R. 23.) As to these the Commission said:

> Defendants' switching charges and absorptions differ in amount. The measure of the switching charges is not in issue. (R. 28.)

The manner in which absorption should be made under the order was illustrated as follows:

> * * * if defendants continue the absorption of switching charges at Michigan City and the Monon [for example] can reach any industry on any other defendant's rails by a maximum absorption of $6.30 per car, removal of the unjust discrimination against industries on complainant's lines would not require the absorption of a greater amount on traffic destined to or originated at such industries. (R. 29.)

The ultimate finding of unjust discrimination and undue prejudice follows:

> We find that the refusal of defendants to switch interstate carload traffic moving over complainant's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point, and the failure and refusal of the defendants to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with complainant upon relatively reasonable terms, based upon a careful consideration of the similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in such arrangements with each other at that point, subjects complainant and its shippers to unjust discrimination and undue prejudice which will be ordered removed. (R. 29.)

The order. The pertinent provisions of the order entered by the Commission read as follows:

> It is ordered, That the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before July 24, 1924, and thereafter to abstain from the unjust discrimination and undue prejudice found in said report to result from their refusal to switch interstate carload traffic moving over complainant's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point and from their failure and refusal to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with complainant at Michigan City, Ind., upon relatively reasonable terms based upon a careful consideration of similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in arrangements with each other at that point.
>
> It is further ordered, That said defendants be, and they are hereby, notified and required to establish, on or before July 24, 1924, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply rates, regulations, and practices which will prevent and avoid the aforesaid unjust discrimination and undue prejudice.

> And it is further ordered, That this order shall continue in force until the further order of the commission. (R. 30.)

Soon after this order was entered the four steam railroads, appellants herein, petitioned the Commission for a reargument before the full Commission. On June 17, 1924, this petition was denied. (R. 5.)

PROCEEDINGS IN THE LOWER COURT

On June 24, 1924, the four steam railroads, appellants herein, filed a petition in the court below praying for an interlocutory injunction, and upon final hearing a permanent injunction, to set aside the order. (R. 1.) The United States was made party defendant. The Interstate Commerce Commission and the South Shore intervened as defendants. All three filed answers. (R. 35, 53, 56.) The court, consisting of Hon. Samuel Alschuler, Circuit Judge, and Hon. Albert B. Anderson and Hon. Walter C. Lindley, District Judges, heard the case upon the "application for an interlocutory injunction and upon the pleadings, proceedings, and proofs herein filed on behalf of both parties and the intervenors," and on July 8, 1924, entered its decree denying the application. (R. 62.)

APPELLANTS' CONTENTIONS

The following four contentions are made in appellants' brief in this court:

> [1.] Unlawful discrimination can not exist unless there is a physical connection by

the carrier alleged to be guilty of the discrimination with the railroad or shipper claiming to be discriminated against, or a service being performed for the railroad or shipper discriminated against through the medium of joint routes or joint rates (p. 25).

[2.] The circumstances and conditions are dissimilar, and for that reason the order of the Commission is unlawful (p. 38).

[3.] The order of the Commission deprives these appellants of their property without due process of law, in violation of the fifth amendment to the Federal Constitution, and is, therefore, unlawful (p. 46).

[4.] The record shows that no satisfactory evidence was introduced before the Commission to show that the South Shore is such a common carrier as comes within the provisions of the Interstate Commerce Act (p. 48).

ARGUMENT

SUMMARY

I. The evidence shows that the South Shore is engaged in the transportation of property by railroad in interstate commerce and is therefore subject to the Interstate Commerce Act.

II. The Commission's findings of unjust discrimination and undue prejudice are amply supported by the evidence and are final.

1. Although three of appellants do not connect with the South Shore, they have arrangements with the Lake Erie & Western by which they reach it and are thus "effective instruments of discrimination."

2. The circumstances and conditions are similar.

III. The Commission's order requires merely the removal of discrimination and does not deprive appellants of their property without due process of law.

PERTINENT PROVISIONS OF THE STATUTE

Section 1, paragraph (1), of the interstate commerce act (24 Stat. L. 379; 41 Stat. L. 474) provides:

> (1) That the provisions of this act shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad * * *

> from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia * * * or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation * * * takes place within the United States.

Section 2 and paragraphs (1) and (3) of section 3 of the act (24 Stat. L. 379, 380; 41 Stat. L. 479), which declare certain discriminations to be unlawful, read as follows:

> SEC. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is

hereby prohibited and declared to be unlawful.

SEC. 3. (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsover, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

(3) All carriers engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

Section 15, paragraph (1) (24 Stat. L. 384; 441 Stat. L. 484), authorizes the Commission, after hearing, to order the removal of unlawful discriminations found by it to exist under sections 2 and 3. The pertinent provisions of this paragraph read as follows:

SECTION 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged * * *, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge

so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

I. THE EVIDENCE SHOWS THAT THE SOUTH SHORE IS ENGAGED IN THE TRANSPORTATION OF PROPERTY BY RAILROAD IN INTERSTATE COMMERCE AND IS, THEREFORE, SUBJECT TO THE INTERSTATE COMMERCE ACT

The contention that the South Shore is not subject to the Interstate Commerce Act seems frivolous in view of the recent decision of this Court in *United States* v. *Village of Hubbard,* 266 U. S. 474. There it was held that the Commission, in the exercise of its power to require an increase in intrastate railway fares which subjected interstate commerce to unjust discrimination, had jurisdiction over two intrastate interurban electric railroads engaged in interstate commerce, irrespective of whether either was operated as part of a steam railway system, or engaged in the general transportation of freight in addition to its passenger and express business.

As indicated in that case the basis for the jurisdiction of the Commission over electric lines is to be found in section 1 of the interstate commerce act. Paragraph (1) of this section provides that this act " shall apply to common carriers engaged in (a) The transportation of passengers or property wholly by railroad " in interstate commerce. Section 15 (1), which, as shown above, authorizes the

Commission to order the removal of unlawful discrimination, and sections 2 and 3, which define such discrimination, apply to carriers "subject to * * * this act," without qualification or exception in respect of electric railroads. The only question then is whether the South Shore comes within the definition of common carrier in section 1, that is, whether it is engaged in the transportation of passengers or property wholly by railroad in interstate commerce.

The Commission found, among other things, that the South Shore " is an electric line approximately 76 miles long which operates between South Bend, Ind., and Kensington, Ill., a point within the corporate limits of the city of Chicago " (R. 22); and, again, " Most of the traffic transported by the South Shore to Michigan City consists of coal, lumber, and other commodities received from the Illinois Central, with which it connects at Kensington and with which it has joint rates." (R. 25.)

These facts, without referring to others found by the Commission, are sufficient to show that the South Shore is a common carrier engaged in the transportation of property by railroad in interstate commerce and hence is a carrier within the meaning of sections 1, 2, 3, and 15(1), the sections with which we are here concerned.

Appellants, however, suggest that a " grave question " is raised as to whether the South Shore comes within the provisions of section 15(3) (24 Stat. L.

384, 41 Stat. L. 485) authorizing the establishment of through routes, since the Commission is therein prohibited from establishing such routes—

> between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character.[1]

They contend in effect that no satisfactory evidence was introduced before the Commission to show that the South Shore was "engaged in the general business of transporting freight" and suggest that the statement in the report, "We specifically found that it was engaged in the general transportation of freight in *Indiana Passenger Fares of C. L. S. & S. B. Ry. Co.*, 69 I. C. C. 180, and this record does not refute that finding," shows that the Commission relied not upon evidence introduced at the hearing before it but upon a finding of facts made some years before in another case.

Aside from the fact that the order here under consideration was not made under section 15(3), the South Shore is not a "street electric passenger railway." On the contrary it is an interurban railroad which serves many communities, is con-

[1] The language quoted was introduced into the Act to Regulate Commerce, now the Interstate Commerce Act, in 1910 (36 Stat. L. 552), and was practically the same as that contained in the bill when it passed the House (H. R. 17536). The Senate substituted "street, suburban, or interurban electric passenger railways" for "street electric passenger railways." The bill as finally adopted, however, omitted "suburban or interurban" and thus showed the intent of Congress to include only "street railways" proper.

nected with the steam railroad transportation system of the country "so that freight may be shipped, without breaking bulk, across the continent," and is a well established channel of interstate commerce. *Omaha Street Ry.* v. *Int. Com. Comm.*, 230 U. S. 324, 336, 337; *Village of Hubbard Case*, 266 U. S. 474, 478. But even if it were a street railway, the findings above referred to show that it is in fact "engaged in the general business of transporting freight." In addition to these findings the Commission's report shows that one of the defendants, the Lake Erie & Western, has already entered into reciprocal switching arrangements with it at Michigan City and interchanges freight traffic with it there pursuant to the Commission's decision in 58 I. C. C. 647 (R. 23, 25); that "The South Shore was fully described and its status defined" in that decision (R. 22) which also clearly shows that it was engaged in the general business of transporting freight (R. 47); and that "Its President testified that there has been no important change in the construction or operation of its line since" then. (R. 22.) Under these circumstances, the Commission's reference to the later decision in 69 I. C. C. 180, was proper. But irrespective of this decision, the Commission's findings fully established its jurisdiction to grant relief to the South Shore, even on the theory that it was necessary to show that this carrier was "engaged in the general business of transporting freight," a theory which we believe to be erroneous.

II. THE COMMISSION'S FINDINGS OF UNJUST DISCRIMINATION AND UNDUE PREJUDICE ARE AMPLY SUPPORTED BY THE EVIDENCE AND ARE FINAL

Section 3 "forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation, or locality; what is such undue or unreasonable preference or advantage is a question not of law, but of fact. * * * If the order made by the Commission does not contravene any constitutional limitation and is within the constitutional and statutory authority of that body, and not unsupported by testimony, it can not be set aside by the courts, as it is only the exercise of an authority which the law vests in the Commission." *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 361. "The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions." *United States* v. *New River Co.,* 265 U. S. 533, 542.

Carriers are entitled to protection against unjust discrimination and undue prejudice as fully as any shipper. *Pennsylvania Co.* v. *United States, supra,* and *Chicago Junction case,* 264 U. S. 258, 267.

1. Although three of appellants do not connect with the South Shore, they have arrangements with the Lake Erie & Western by which they reach it and are thus "effective instruments of discrimination"

Apparently the principal contention made by appellants is "that as a matter of law there can be no discrimination against the South Shore and its

shippers by either the Pere Marquette, the Monon, or the Michigan Central, because these carriers do not come in contact with the South Shore, nor have any joint arrangement with it and the intermediate line of the Lake Erie & Western, whereby they serve the South Shore and its shippers." (Appellants' brief, p. 28.)

The Commission, it is true, has found that the Pere Marquette, the Monon, and the Michigan Central do not connect physically with the South Shore. However, it has found that there is already an arrangement between each of these carriers and the Lake Erie & Western, as an intermediate line, by which traffic is moved to and from the South Shore rails. The Commission, for example, pointed out in its report that " Company material consigned to the South Shore is switched over the defendants' [appellants'] line and the charges are absorbed because the South Shore is named as an industry in the defendants' tariffs." (R. 24.) The South Shore is thus within the switching district at Michigan City and through routes and arrangements are already in effect by which traffic will be delivered by appellants to it as an industry [2] although not to it as a carrier. Under these arrangements appel-

[2] From the standpoint of liability shipments delivered to it under the existing tariff arrangements are in legal contemplation delivered by the Pere Marquette, the Monon, and the Michigan Central, and they would be liable for damages as *delivering* carriers although the actual switching movements were performed by the Lake Erie & Western. *Missouri Pacific R. Co.* v. *Reynolds-Davis Grocery Co.*, decided May 25, 1925, 268 U. S. 366.

lants reach the rails of the South Shore and are effective instruments of discrimination.

The Commission has found that the fact that the Lake Erie & Western must act as an intermediate carrier of traffic interchanged between the South Shore and the other three appellants is "not a transportation difference." (Rec. 28.) Certainly absence of physical connection and the necessity of a switching haul by an intermediate line are not criteria which appellants apply in interchanging traffic and performing services for each other. The Michigan Central interchanges traffic with the Pere Marquette and has reciprocal switching arrangements with it. Yet traffic between these lines must be switched by the Monon as an intermediate carrier. Likewise traffic between the Pere Marquette and the Lake Erie & Western must be switched by the Monon as an intermediate carrier.

The similarity of transportation services is illustrated by the fact that the Lake Erie & Western, under the existing reciprocal arrangements with the other appellants, will, as previously pointed out, switch traffic coming from their rails for delivery to the South Shore as an industry, but refuses to haul traffic over the identical rails and between the same points when for delivery to the South Shore for transportation by it beyond. Moreover, the Pere Marquette, the Monon, and the Michigan Central under these reciprocal arrangements will haul traffic to the rails of the Lake Erie & Western

for transportation by it to or past the South Shore rails, but refuse to haul such traffic over the same rails and for the same distances to the Lake Erie & Western when it is to be switched beyond to the South Shore for further transportation.

The facts before the Commission, we submit, presented a case for the exercise of the Commission's administrative judgment and discretion and its conclusion that there were no transportation differences warranting the unjust discrimination and undue prejudice found is conclusive. Absence of physical connection between the South Shore and three of appellants can not, as a matter of law, justify the discrimination practiced against the South Shore and its shippers. This, we believe, is settled by recent decisions of this court.

In *United States* v. *Ill. Cent. R. R.*, 263 U. S. 515, this court sustained an order of the Commission based upon a finding that the Illinois Central and the short line connecting with it at Fernwood, Miss., were guilty of unjust discrimination in maintaining from points on the Illinois Central, including Fernwood and points south thereof, to northern destinations, rates on lumber, which were lower than the rates contemporaneously maintained from points on the short line via Fernwood and the Illinois Central to the same destinations. It was held that the fact that the Illinois Central did not reach the prejudiced points on the short line or that the short line was not a party to the rates from the

favored points on the Illinois Central did not prevent the discrimination from being unlawful as found. In dealing with this question this court, in an opinion by Mr. Justice Brandeis, said at page 520:

> * * * By joining with the Illinois Central in establishing the prejudicial through rate from Knoxo the Fernwood & Gulf became as much a party to the discrimination practiced as if it had joined also in the lower rates to other points which are alleged to be unduly preferential. Compare *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136, 144. If such were not the law, relief on the ground of discrimination could never be had against preferential rates given by a great railway system to points on its own lines which result in undue prejudice to shippers on short lines connecting with it. Moreover, it is not true that the Illinois Central can not remove the discrimination without the cooperation of the Fernwood & Gulf. The order leaves the carriers free to remove the discrimination either by making the Knoxo rate as low as that from Fernwood or by raising the rate from Fernwood or by giving both an intermediate rate. *American Express Co.* v. *Caldwell,* 244 U. S. 617, 624. The Illinois Central, acting alone, is in a position to raise the rate from Fernwood. For its main line extends from there to the Ohio River crossings, the rate-breaking point.

In dealing with a similar case in the same opinion the following language was used, page 527:

In No. 38, where the short line alone seeks to set aside the Commission's order, this additional fact requires mention. The rate to the short-line points is not a joint rate, but a combination of the trunk-line rate to the junction and the short-line local rate. The distinction is without legal significance in this connection. A through route was established, and the transportation is performed as the result of this arrangement between the carriers, expressed or implied. Undue prejudice may be inflicted as effectively by a through rate which is a combination of locals as by a joint through rate. The power of the Commission to remove the unjust discrimination exists in both classes of cases.

The situation of the Pere Marquette, the Monon, and the Michigan Central is in each case comparable with that of the Illinois Central in the above case, while the situation of the Lake Erie & Western is similar to that of the short line. The Monon, for example, by the switching arrangement already in existence reaches the South Shore through the Lake Erie & Western as a switching line in the same manner in which the Illinois Central reached points on the short line in the case referred to. There, it is true, the question of rates was involved but the principle announced is applicable. The Monon in the illustration given actually participates in the denial of transportation to and from the South Shore while performing similar transportation for its immediate connections. More-

over, it can remove the discrimination without the cooperation of the Lake Erie & Western. This could be done by denying reciprocal switching to its direct connections, the other appellants.

In the *St. Louis Southwestern case,* 245 U. S. 136, *supra,* an order of the Commission was sustained which required certain carriers to establish and maintain through routes from various points in "blanket territory" in the southwest to Paducah, Ky., via either Memphis or Cairo, and joint rates not in excess of the rate then in effect to Cairo. The Commission had found a 22-cent rate to Paducah unreasonable to the extent that it exceeded a rate of 16 cents to Cairo and unduly preferential of the latter. Two of the three roads which attacked the order had "their own rails from the 'blanket territory' to Cairo but can reach Paducah only over a connecting line," i. e., the Illinois Central from Cairo or Memphis. The third road could reach both Cairo and Paducah only over the Illinois Central as a connecting line from Memphis to these points. In dealing with a contention similar to the one made here, this court, in an opinion by Mr. Justice Brandeis, said:

> *Second.* Carriers insist also that the order is void on the ground that, since their "rails do not reach Paducah, they can not be guilty of discrimination against that city." They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah,

> although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose "rails" reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission, supra.* (p. 144.)

While it was stated in the opinion that the order "is not primarily an order to remove discrimination in violation of section 3," the language above quoted indicates that this court considered it sustainable under that section.

In *United States* v. *Pennsylvania Railroad Co.*, 266 U. S. 191, a finding by the Commission of unjust discrimination and undue prejudice by the Pennsylvania at York, Pa., was upheld, although that carrier contended that the favored industries served by it under trackage arrangements over the line of the Western Maryland were in legal contemplation on its own rails, while the industries found to have been prejudiced were not on its own rails but on those of the Western Maryland and were, therefore, so dissimilarly situated as to preclude, as a matter of law, such a finding.

See also *Union Pacific Railroad* v. *Updike Grain Co.*, 222 U. S. 215, involving discrimination in

allowances to elevators located on the carrier's own rails as contrasted with allowances by it to elevators on connecting lines.

Central Railroad Co. v. *United States,* 257 U. S. 247, relied upon by appellants, is clearly distinguishable from the present case and affords no basis for setting aside the order here involved. There the Commission had found that the Central Railroad was guilty of unlawful discrimination in refusing to accord shippers on its lines certain transit privileges in respect of creosoting lumber, which were accorded by that company's southern connections with which it had joint rates and through routes. The court held that the creosoting privilege was a purely local one and that the Central Company had not participated in granting it and hence could not be guilty of discrimination in refusing to accord it to shippers on its line. In a footnote to the opinion in the *Illinois Central Case,* 263 U. S. 515, 520, *supra,* the *Central Railroad Company case* was distinguished as follows:

> * * * In *Central R. R. Co. of New Jersey* v. *United States,* 257 U. S. 247, the creosoting privilege was not a part of the joint tariff. It was an item in the local tariff granted without the concurrence of the carriers before the Commission; and the revenues derived therefrom were not shared by them.

In the present case each of the appellants participated in the discrimination by refusing to trans-

port traffic from its line to or from that of the South Shore, while performing similar transportation for each other, and the practice complained of is not, as in the *Central Railroad case,* a matter of local concern which is beyond their lines and over which they have no control.

The principles laid down in the above decisions, when applied to the present case, fully sustain the order here under consideration.

2. The circumstances and conditions are similar

The absence of physical connection between three of appellants and the South Shore and the circumstance that the Lake Erie & Western acts as an intermediate carrier have already been discussed. These and the other circumstances and conditions to which appellants call attention, including differences in the extent of facilities available at Michigan City, the number of industries served, and reciprocal switching performed there and at other points, are all matters for the administrative judgment and discretion of the Commission. The fundamental fact is clear that appellants refused to interchange traffic or establish reciprocal switching arrangements with the South Shore at Michigan City, while interchanging traffic and having such arrangements with each other at that point. The report of the Commission shows that there was abundant evidence of the character of services involved, the points of connection, the switching distances, the arrangements for absorp-

tion of switching charges, the shippers on the South Shore and on appellants' lines in that city, and other circumstances and conditions attending the transportation granted and refused. The Commission's finding that the circumstances and conditions were similar and that there was unjust discrimination and undue prejudice is clearly supported by the evidence and is final.

As previously pointed out, " The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions." *United States* v. *New River Co.*, 265 U. S. 533, 542, *supra*. The Commission's " findings are fortified by presumptions of truth ' due to the judgment of a tribunal appointed by law and informed by experience.' " *Interstate Com. Com.* v. *C., R. I. & P. Ry.*, 218 U. S. 88, 110. Since in the present case appellants have not brought before this court the evidence which was before the Commission (*Edward Hines Trustees* v. *U. S.*, 263 U. S. 143, 148), but attack the order upon the findings in the report, and since the Commission is not required to make detailed findings of all the facts upon which it bases its conclusions (*Manufacturers Ry. Co.* v. *U. S.*, 246 U. S. 457, 487), the order could not be held to be invalid unless clearly contrary, as a matter of law, to the facts there set forth, and this has not been shown.

It is interesting to note the similarity between the facts in this case and those in *Buffalo, Roches-*

ter & Pittsburgh Ry. v *Pennsylvania Co.,* 29 I. C. C. 114, the Commission's order in which was sustained by this court in *Pennsylvania Co.* v. *United States,* 236 U. S. 351. There the Commission upon complaint of the Buffalo, Rochester & Pittsburgh found that the Pennsylvania subjected it to undue and unreasonable prejudice in refusing to accept from and to move to it carload lots of freight within the switching limits of New Castle, Pa., while performing this service for three other trunk lines serving New Castle and connecting there with the Pennsylvania. The Commission's order required the removal of this discrimination. The terminal facilities of the Pennsylvania were more extensive than those of the Buffalo, Rochester & Pittsburgh (29 I. C. C. 115) just as appellants' facilities in the present case were found to be more extensive than those of the South Shore (R. 26). The Pennsylvania had spur tracks reaching 26 industries within the switching limits (id. p. 115) as compared with 60, or an average of 15, reached by appellants in the present case (R. 24). The Rochester Company had only three industries on its line within those limits (id. p. 115) while the South Shore has the same number (R. 24). The Pennsylvania there contended, among other things, that the discrimination against the Buffalo, Rochester & Pittsburgh was justified because the three other trunk lines "are in position either at New Castle or elsewhere to offer it reciprocal advantages that are fully compensatory for the switch-

ing done for them in New Castle, whereas complainant is not in position to offer similar advantages by way of compensation at New Castle or elsewhere." (id., p. 117.) A similar contention is made in the present case and is disposed of by reference to the discussion in that case (R. 28). There the Commission in overruling the contention pointed out that if the discrimination could be justified—

> because of reciprocal services performed at other and distant places by some of the carriers having connection with its line at New Castle, it would then seem to be necessary to determine the extent and measure of those services performed at such other places by each carrier and the value thereof to the defendant, a manifestly futile undertaking involving indefinite, uncertain, and speculative and, as we think, irrelevant questions and considerations as to the value of this and that service and the varying cost of performing it at many and remote places, impossible of satisfactory and reliable determination. (Id. p. 118.)

It is to be observed that the amount of compensation is not involved in either case. (R. 28.)

The Commission's order in the present case should be sustained just as its order was in that case.

III. THE COMMISSION'S ORDER REQUIRES MERELY THE REMOVAL OF DISCRIMINATION AND DOES NOT DEPRIVE APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW

The Commission's order requires appellants to remove unjust discrimination and undue prejudice

practiced by them against the South Shore and its shippers at Michigan City in respect to switching. The requirement is that only to the extent that appellants switch for and have reciprocal switching arrangements with each other, they shall switch for and enter into such arrangements with the South Shore. They are left free to remove the discrimination by any appropriate action and may, if they choose, do so by discontinuing the reciprocal arrangements which they now have with each other at Michigan City.

Appellants overlook the alternative character of the order when they assume " the only way appellants can comply with " it " is by extending their services so as to reach the South Shore." (Appellants' brief, p. 46.) There is no absolute requirement that their lines be extended under section 1 (21) or that use of their terminal facilities be granted under section 3 (4) or that through routes and joint rates be established under section 15 (3), and the order need not therefore be supported by findings provided for in those sections. (See Commission's report, Rec. 27.)

Appellants can not complain that their property is taken when they themselves offer their terminals for reciprocal switching for each other and are required merely to accord to the South Shore and its shippers the same treatment which they thus give to each other.

In *Pennsylvania Co.* v. *United States,* 236 U. S. 351, *supra,* this court, in stating the facts, said,

among other things, " The Pennsylvania Company refuses all interchange of carload freight, whether incoming or outgoing, with the Rochester road within the switching limits of New Castle; but it does conduct such interchange with the Erie, the Pittsburgh & Lake Erie, and the Baltimore & Ohio roads " (p. 359). " The Commission found this practice to be an undue and unreasonable discrimination against the Rochester Company, and made an order requiring the Pennsylvania Company to desist therefrom " (p. 360). The complaint by the Rochester Company had asked not only for the removal of the discrimination but for the establishment of through routes and rates between it and the Pennsylvania at New Castle. The Commission's order, however, required merely the removal of discrimination.

In holding that the order did not amount to an appropriation of the terminals of the Pennsylvania Company this court, speaking through Mr. Justice Day, said, among other things:

> So here there is no attempt to appropriate the terminals of the Pennsylvania Company to the use of the Rochester Company. What is here accomplished is only that the same transportation facilities which are afforded to the shipments brought to the point of connection over tracks used in common by the Baltimore & Ohio Railroad and the Rochester Company shall be rendered to the Rochester Company as are given to the Baltimore & Ohio Company under precisely the same cir-

> cumstances of connection for the transportation of interstate traffic. All that the Commission ordered was that the Company desist from the discriminatory practice here involved, and in so doing we think it exceeded neither its statutory authority nor any constitutional limitation, and that the District Court was right in so determining. (P. 371.)

It is to be observed that the Pennsylvania had for some time maintained reciprocal switching arrangements at New Castle with the three preferred carriers under which for the years 1909, 1910, and 1911, for example, over 65,000 cars were switched for or by it. (29 I. C. C. 117.) There was, therefore, as much room for assuming in that case that the order did not contemplate a discontinuance of the existing switching arrangements and in reality required extension of services as there is for appellants' assumption in the present case. It is also to be observed that this court there held that *L. & N. R. R. Co.* v. *Central Stockyards,* 212 U. S. 132, relied upon by appellants in the present case, was not in point. (Pp. 369–371.) That was not a case under the Interstate Commerce Act and the facts were entirely different from those here under consideration.

In *Louisville & Nashville R. R.* v. *United States,* 238 U. S. 1, the Commission had found that it was unlawfully discriminatory for the Louisville & Nashville and the Nashville, Chattanooga & St. Louis to refuse to switch at Nashville coal and competitive business for the Tennessee Central while

switching for each other practically all traffic and for the Tennessee Central traffic other than coal and competitive business. In sustaining the Commission's order requiring the removal of this discrimination and holding that it was not unconstitutional, this court, speaking through Mr. Justice Lamar, pointed out that " the Commission is not dealing with an original proposition, but with a condition brought about by the Appellants themselves "; that " Having made the Yard a facility for many purposes and to many patrons, such railroad facility is within the provisions of section 3 of the statute which prohibits the facility from being used in such manner as to discriminate against patrons and commodities "; and that " Whatever may have been the rights of the carriers in the first instance * * * the Appellants can not open the Yard for most switching purposes and then debar a particular shipper from a privilege granted the great mass of the public. In substance that would be to discriminate not only against the tendering railroad, but also against the commodity which is excluded from a service performed for others " (pp. 18, 19). In the present case each of the appellants, as the Commission points out in its report, " holds itself out to switch practically all traffic of any other defendant, regardless of the length of the switching haul or point of origin or destination of the shipment." (R. 28.)

In *United States* v. *Pennsylvania Railroad,* 266 U. S. 191, *supra,* the Pennsylvania and the Western

Maryland had an arrangement by which within a certain zone at York, Pa., " each is permitted to * * * pass over the road of the other with its own locomotives and attached cars in order to make deliveries to and accept shipments from plants located on spurs directly connected only with the road of the other carrier. Industries within the zone thus get the same advantage over those without it [on these two roads], which would flow from an agreement for reciprocal free switching or for absorption of the switching charges which was limited to their traffic. The Commission found that, ' from the standpoint of carriage, the situation of industries inside and outside the zone is substantially similar '; and that the described practice ' subjects shippers * * * without the zone to undue prejudice and disadvantage " (pp. 196, 197). In upholding the Commission's order requiring the removal of this undue prejudice and disadvantage this court, in an opinion by Mr. Justice Brandeis, said, among other things:

> The Commission has found, not merely that the facilities in question were granted to some and refused to others, but that the grant and refusal have, by reason of the use made and intended to be made of the facilities, resulted in undue prejudice. It is true that an extension of trackage rights, an enlarged common use of terminals, or the establishment of through routes and joint rates, or the withdrawal of any of them, could not be ordered except upon the find-

> ings and conditions prescribed in the Act. But the order complained of does not require any such thing. It requires only that the carriers shall desist from a practice which involves such use as has resulted and will result in the undue prejudice found. The order leaves them free to remove the discrimination by any appropriate action. [Cases cited.] To accomplish this, it is not necessary that the Pennsylvania should grant to the other carriers the extensive use of the terminal facilities and tracks which was sought, and which the Commission found was not shown to be in the public interest (pp. 199, 200).

See also *Seaboard Air Line Ry. Co.* v. *United States,* 254 U. S. 57, in which an order of the Commission in respect to discrimination in the absorption of switching charges at Richmond, Va., was upheld.

The decisions above referred to clearly establish the statutory and constitutional authority of the Commission to do what it did in the present case.

CONCLUSION

"It is apparent from the legislative history of the act [to regulate commerce] that the evil of discrimination was the principal thing aimed at." *Houston & Texas Railway Co.* v. *United States,* 234 U. S. 342, 356. Sections 2 and 3 sought to remedy this evil and to bring about equality of treatment not only as to shippers but also as to carriers. *Chicago Junction Case,* 264 U. S. 258,

267. The Transportation Act, which greatly enlarged the Commission's power to deal with other matters, did not narrow or restrict its jurisdiction over discrimination. *United States* v. *Pa. R. R.*, **266 U. S. 191, 199.**

Orders of the Commission prohibiting unlawful discrimination against both carriers and shippers in respect of switching have been sustained by this court in a number of cases. They clearly establish the authority of the Commission to make the order here under consideration. *Pennsylvania Co.* v. *U. S.*, 236 U. S. 351; *U. S.* v. *Pennsylvania R. R.*, 266 U. S. 191, *supra.* And this authority is not affected by the fact that three of appellants do not connect physically with the South Shore. *United States* v. *Ill. Cent. R. R.*, 263 U. S. 515, *supra.* While not connecting physically, they reach that line under switching arrangements now existing with the Lake Erie & Western and are "effective instruments of discrimination." *St. L. S. W.* v. *U. S.*, 245 U. S. 136, 144.

It is true that the South Shore operates merely an electric line, while appellants operate steam railroads. But electric lines and their shippers are as much entitled to protection under sections 2 and 3 as steam roads. *United States* v. *Village of Hubbard,* 266 U. S. 474.

There is no contention by appellants that the proceedings before the Commission were irregular. Full opportunity to be heard was granted. The Commission in the exercise of the administrative

discretion conferred upon it has carefully and deliberately considered all the facts and circumstances and has concluded and found that appellants are guilty of unjust discrimination and undue prejudice. Its findings under the act are well within statutory and constitutional limits, are amply supported by the evidence, and are therefore conclusive.

We respectfully submit that the decree of the District Court should be affirmed.

R. GRANVILLE CURRY,
For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

○

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925.

No. 150

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR APPELLEE, THE CHICAGO, LAKE SHORE AND SOUTH BEND RAILWAY COMPANY.

ERNEST S. BALLARD,
RUSH C. BUTLER,
WILLIAM E. LAMB,
JAMES DALE THOM,
Solicitors for The Chicago, Lake Shore and South Bend Railway Company.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

Subject Index.

TABLE OF STATUTES AND CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 150

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY, *et al.*,
Appellants,

vs.

THE UNITED STATES OF AMERICA, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

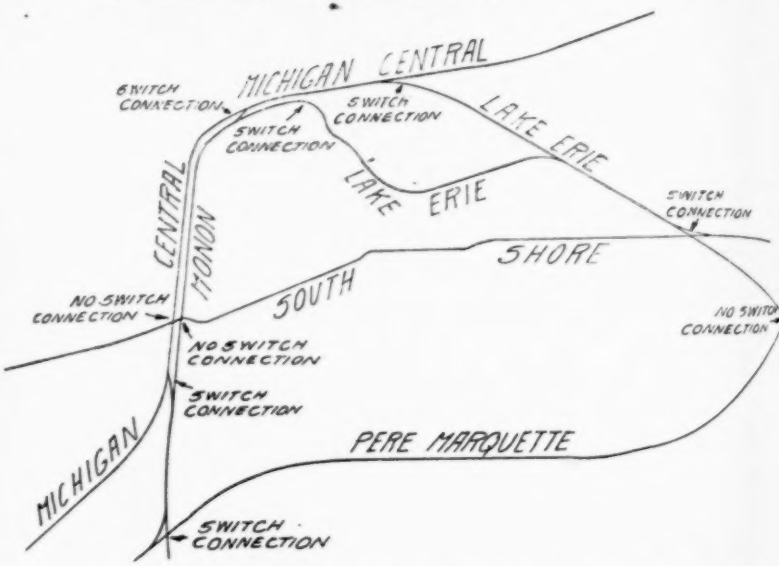
BRIEF FOR APPELLEE, THE CHICAGO, LAKE SHORE AND SOUTH BEND RAILWAY COMPANY.

STATEMENT OF THE CASE.

Appellee, the Chicago, Lake Shore and South Bend Railway Company (hereinafter referred to as the South Shore), one of the defendants below and the complainant before the Interstate Commerce Commission, operates a line of electric railroad between South Bend, Indiana, on the east and Kensington, Illinois, a point within the corporate limits of Chicago, on the west, and is engaged in the general transportation of passengers and property. The South Shore runs through Michigan City, Indiana, which is also reached by the lines of the Lake Erie & Western Railroad

Company (hereinafter referred to as the Lake Erie), the Michigan Central Railroad Company, the Chicago, Indianapolis and Louisville Railway Company (hereinafter referred to as the Monon) and the Pere Marquette Railway, appellants here and petitioners below.

In Michigan City the South Shore connects with the Lake Erie and the Lake Erie connects with the Michigan Central and the Monon. The Pere Marquette connects with the Monon. The position of the said five lines is shown in Exhibit D attached to the petition herein (R. 30) and Exhibit B, attached to the answer of the South Shore (R. 52). It is as follows:



In *C. L. S. & S. B. Ry. Co.* v. *Director General*, 58 I. C. C. 647, the Interstate Commerce Commission made an order requiring the Lake Erie to enter into reciprocal switching arrangements with the South Shore at Michigan City on the same terms and conditions as with the Monon and the Pere Marquette. The two last named

lines and the Michigan Central were not parties to that case and no order was made against them. The Lake Erie complied with the order by establishing reciprocal switching arrangements with the South Shore so far as industries served directly by it were concerned, but failed to make any provision for switching between the line of the South Shore and the lines of the other appellants at Michigan City, with which the South Shore has no direct connection. Moreover the other appellants declined to accept the traffic of the South Shore when tendered to them by the Lake Erie.

All of the appellants have opened their terminals at Michigan City to one another by establishing interchange and reciprocal switching arrangements among themselves, but have refused to establish such arrangements with the South Shore. For the purpose of securing from appellants, upon relatively reasonable terms, treatment similar to that which they accord to one another, the South Shore filed its complaint with the Interstate Commerce Commission. Upon this complaint a hearing was had and the presiding Examiner rendered a proposed report in which he recommended that the relief prayed for by the South Shore be granted. The appellants filed exceptions, supported by brief, to the Examiner's report and the case was orally argued before Division 3 of the Commission. Subsequently the Commission made its report and entered its order, granting the relief sought by the South Shore. *Chicago, Lake Shore and South Bend Railway Company* v. *L. E. & W. R. R. Co.*, 88 I. C. C. 525. A petition for re-argument was thereupon filed by the appellants and denied by the Commission.

The order made by the Commission was as follows (R. 30):

"This case being at issue upon complaint and an-

swers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before July 24, 1924, and thereafter to abstain, from the unjust discrimination and undue prejudice found in said report to result from their refusal to switch interstate carload traffic moving over complainant's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point, and from their failure and refusal to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with complainant at Michigan City, Ind., upon relatively reasonable terms based upon a careful consideration of similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in arrangements with each other at that point.

It is further ordered, That said defendants be, and they are hereby, notified and required to establish, on or before July 24, 1924, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply rates, regulations, and practices which will prevent and avoid the aforesaid unjust discrimination and undue prejudice.

And it is further ordered, That this order shall continue in force until the further order of the commission."

As is customary in cases of discrimination this order is in the alternative and requires the appellants to cease and desist from the unlawful discrimination which the Commission found to exist, and to establish, maintain nad apply rates, regulations, and practices which will prevent and avoid that unlawful discrimination in the future.

The findings set forth in the Commission's report on which the order rests are in substance as follows: That the South Shore is engaged in the general transportation of freight (R., 27); that the terminals of appellants at Michigan City are open to one another but closed to the South Shore (R., 27); that the appellants have entered into arrangements for the interchange of traffic and reciprocal switching among themselves and hold themselves out to switch practically all traffic for one another regardless of the length of haul or point of origin, but refuse to enter into such arrangements with and switch traffic for the South Shore (R., 23-24); that there are three industries located on the line of the South Shore at Michigan City, two of which compete with industries on the lines of appellants at that point (R., 24); that the circumstances and conditions surrounding the interchange of traffic and reciprocal switching among appellants on the one hand and between the appellants and the South Shore on the other hand are substantially similar (R., 28); and that the refusal of appellants to switch interstate carload traffic moving over the line of the South Shore to or from Michigan City, while contemporaneously switching interstate carload traffic for each other at that point, and their failure and refusal to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with the South Shore, upon relatively reasonable terms based upon a careful consideration of the similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in such arrangements with each other at that point, subjects the South Shore and its shippers to unjust discrimination and undue prejudice (R., 29).

The appellants brought this suit in the District Court of the United States for the District of Indiana and therein sought an interlocutory injunction restraining and suspending the order of the Commission until final hearing, and, upon final hearing, a decree annulling and enjoining the order. The case was heard before three judges on the plaintiff's motion for an interlocutory injunction. The District Court, without opinion, denied the injunction, and the case is before this court on direct appeal under the Act of June 18, 1910, c. 309, 36 Stat. 539, and the Act of October 22, 1913, c. 32, 38 Stat. 220.

SUMMARY OF ARGUMENT.

There are only two questions presented by this appeal: First, whether the Commission's conclusions upon the basis of which it exercised its statutory power were erroneous as a matter of law; and, second, whether the Commission's exercise of its powers deprived appellants of any of their constitutional rights. We advance affirmative arguments of our own as well as reply to the contentions in appellants' brief on these questions.

I.

SECTIONS 3 AND 15 OF THE INTERSTATE COMMERCE ACT CONFER UPON THE COMMISSION THE POWERS INVOKED BY THE COMPLAINT AND EXERCISED BY THE COMMISSION IN MAKING ITS ORDER.

Interstate Commerce Act, 41 Stat. 479, Paragraph (1), Section 3.

Interstate Commerce Act, 41 Stat. 479, Paragraph (3), Section 3.

Interstate Commerce Act, 41 Stat. 484, Paragraph (1), Section 15.

II.

THE COMMISSION'S FINDING THAT THE APPELLANTS WERE GUILTY OF UNJUST DISCRIMINATION AGAINST THE SOUTH SHORE IS FULLY SUPPORTED BY THE UNDISPUTED FACTS FOUND BY THE COMMISSION AND THE ORDER REQUIRING THEM TO CEASE AND DESIST THEREFROM IS WITHIN THE COMMISSION'S STATUTORY POWER.

1. **THE UNDISPUTED FINDINGS OF FACT CONTAINED IN THE COMMISSION'S REPORT FULLY SUPPORT THE ULTIMATE FINDING OF UNJUST DISCRIMINATION.**

Louisiana & P. B. Ry. Co. v. *U. S.* 257 U. S. 114.

Louisville & Nashville R. R. Co. v. *U. S.* 238 U. S. 1.

Interstate Commerce Commission v. *I. C. R. R. Co.* 215 U. S. 452.

United States v. *I. C. R. R. Co.* 263 U. S. 515.

Seaboard Air Line Ry. Co. v. *U. S.* 254 U. S. 57.

Pennsylvania Co. v. *U. S.* 236 U. S. 351.

Louisville & Nashville R. R. Co. v. *U. S.* 238 U. S. 1.

2. THE DISCRIMINATION FOUND BY THE COMMISSION IS UNLAWFUL AND IS DIRECTLY ATTRIBUTABLE TO THE APPELLANTS.

(a) There is direct contact between the common carrier operations of appellants and those of the South Shore.

Missouri Pacific R. R. Co. v. *Reynolds-Davis,* 268 U. S. 366.

Shapiro v. *B. & M. R. R. Co.* 213 Mass. 70.

St. Louis S. W. Ry. Co. v. *Jackson,* 55 Tex. Civ. App. 407.

Western Atlantic Ry. Co. v. *Exposition Cotton Mills,* 81 Ga. 522.

United States v. *U. P. R. R. Co.* 213 Fed. 332.

Manufacturers Ry. Co. v. *St. L. I. M. & S. Ry. Co.* 28 I. C. C. 93.

National Spring & Wire Co. v. *Director General,* 60 I. C. C. 564.

New York, New Haven and Hartford R. R. Co. v. *I. C. C.* 200 U. S. 361.

St. Louis S. W. R. R. Co. v. *U. S.* 245 U. S. 136.

Central R. R. Company v. *U. S.* 257 U. S. 247.

(b) In the absence of direct contact between the common carrier operations of appellants and those of the South Shore, the Commission could make a valid order requiring equality of treatment.

United States v. *Pennsylvania R. R. Co.* 266 U. S. 191.

(c) The alleged lack of reciprocity in the extent of terminal facilities and other similar matters does not constitute a differentiating circumstance negativing discrimination.

Pennsylvania Co. v. *United States,* 236 U. S. 351.

United States v. *Illinois Central R. R. Co.* 263 U. S. 515.

(d) The discrimination practiced by appellants is a source of advantage to them and their shippers and of disadvantage to the South Shore and its shippers, and the Commission so found.

III.

THE ORDER OF THE COMMISSION DOES NOT DEPRIVE APPELLANTS OF ANY OF THEIR CONSTITUTIONAL RIGHTS.

United States v. *Pennsylvania R. R. Co.* 266 U. S. 191.

United States v. *Illinois Central R. R. Co.* 263 U. S. 515.

Chicago Junction Case, 264 U. S. 258.

United States v. *American Ry. Exp. Co.* 265 U. S. 425.

Edward Hines Trustees v. *U. S.* 263 U. S. 143.

Wisconsin, etc. R'd. Co. v. *Jacobson,* 179 U. S. 287.

IV.

APPELLANTS' ASSIGNMENTS OF ERROR AND ARGUMENT WITH RESPECT TO THE COMMISSION'S JURISDICTION OVER THE SOUTH SHORE AND THE SOUTH SHORE'S STATUS AS A COMMON CARRIER UNDER PARAGRAPH (3) OF SECTION 15 ARE IRRELEVANT AND UNSOUND.

Interstate Commerce Act, 41 Stat. 484, Paragraph (3), Section 15.

Chicago Junction Case, 264 U. S. 258.

Louisville & Nashville R. R. Co. v. *United States,* 238 U. S. 1.

Pennsylvania Co. v. *United States,* 236 U. S. 351.

Manufacturers Ry. Co. v. *St. L. I. M. & S. Ry. Co.* 28 I. C. C. 93.

C. L. S. & S. B. Ry. Co. v. *Director General,* 58 I. C. C. 647.

Indiana Passenger Fares of C. L. S. & S. B. Ry. Co. 69 I. C. C. 180.

Louisiana & P. B. Ry. Co. v. *U. S.* 257 U. S. 114.

ARGUMENT.

I.

SECTIONS 3 AND 15 OF THE INTERSTATE COMMERCE ACT CONFER UPON THE COMMISSION THE POWERS INVOKED BY THE COMPLAINT AND EXERCISED BY THE COMMISSION IN MAKING ITS ORDER.

Paragraph (1) of Section 3 of the Interstate Commerce Act, 41 Stat. 479, provides as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Paragraph (3) of the same Section provides as follows:

> "All carriers, engaged in the transportation of passengers or property, subject to the provisions of this act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

Paragraph (1) of Section 15 of the Interstate Commerce Act, 41 Stat. 484, provides in part as follows:

> "That whenever, after full hearing, upon a complaint made as provided in Section 13 of this act, * * * the Commission shall be of opinion that

> any individual or joint * * * regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this act, is or will be * * * unjustly, discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe * * * what individual or joint * * * regulation or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, * * * and shall conform to and observe the regulation or practice so prescribed."

The issue presented to the Commission by the complaint was whether the appellants' refusal to accord the same treatment to the South Shore under substantially similar circumstances as they accorded to each other was such discrimination and denial of reasonable, proper and equal facilities as is forbidden by paragraphs (1) and (3) of Section 3 of the Interstate Commerce Act. The relief sought by the South Shore was the removal of that discrimination pursuant to an order to be made by the Commission under paragraph (1) of Section 15 of the Interstate Commerce Act. (R., 22).

After the hearing, the adequacy of which has not been and plainly cannot be denied by appellants, the Commission found that appellants' acts subjected the South Shore and shippers on its line to unjust discrimination. Thereupon, under the terms of the statute, it was the Commission's duty as well as its power to order the discrimination removed. This it did by the following order requiring the appellants to establish, maintain and apply rates, regulations, and practices which will prevent and avoid the unjust discrimination against the South Shore in the future (R., 30):

> "*It is ordered,* That the above named defendants

be, and they are hereby, notified and required to cease and desist, on or before July 24, 1924, and thereafter to abstain, from the unjust discrimination and undue prejudice found in said report to result from their refusal to switch interstate carload traffic moving over complainant's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point, and from their failure and refusal to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with complainant at Michigan City, Ind., upon relatively reasonable terms based upon a careful consideration of similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in arrangements with each other at that point.

It is further ordered, That said defendants be, and they are hereby notified and required to establish, on or before July 24, 1924, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply rates, regulations, and practices which will prevent and avoid the aforesaid unjust discrimination and undue prejudice."

In the succeeding divisions of our brief we shall show that this order was a lawful exercise by the Commission of its statutory powers.

II.

THE COMMISSION'S FINDING THAT THE APPELLANTS WERE GUILTY OF UNJUST DISCRIMINATION AGAINST THE SOUTH SHORE IS FULLY SUPPORTED BY THE UNDISPUTED FACTS FOUND BY THE COMMISSION AND THE ORDER REQUIRING THEM TO CEASE AND DESIST THEREFROM IS WITHIN THE COMMISSION'S STATUTORY POWER.

1. THE UNDISPUTED FINDINGS OF FACT CONTAINED IN THE COMMISSION'S REPORT FULLY SUPPORT THE ULTIMATE FINDING OF UNJUST DISCRIMINATION.

The fourth, fifth and sixth assignments of error (R., 64) are to the effect that the Commission's findings of

fact do not support the finding of unjust discrimination and the order requiring its removal. We deny that these findings are inadequate as alleged and assert that they fully support the Commission's ultimate finding. They are in effect as follows:

At Michigan City the South Shore connects with the Lake Erie, the Lake Erie with the Monon and the Michigan Central, and the Monon with the Lake Erie, the Michigan Central and the Pere Marquette. The Lake Erie and the Michigan Central do not connect with the Pere Marquette; and the Michigan Central, the Pere Marquette and the Monon do not connect with the South Shore. The Monon acts as an intermediate line between the Pere Marquette on the one hand and the Lake Erie and the Michigan Central on the other. (R., 22)

The switching charges and practices of the various roads at Michigan City are as follows: The Michigan Central switches for the Monon, the Lake Erie and the Pere Marquette, and absorbs the switching charges of those roads on traffic switched by them for it. The Monon switches for the Lake Erie, the Michigan Central and the Pere Marquette, and absorbs the switching charges of those roads on traffic switched by them for it. The Pere Marquette switches for the Monon, the Lake Erie and the Michigan Central, and absorbs the switching charges of those roads on traffic switched by them for it. The Lake Erie switches for the Michigan Central, the Monon, the Pere Marquette and the South Shore, and absorbs the switching charges of those roads on traffic switched by them for it. The South Shore switches for the Lake Erie and absorbs the switching charges of the Lake Erie on traffic switched by it for the South Shore. The Michigan Central, Pere Marquette and Monon tariffs make no provision for recip-

rocal switching with the South Shore and those roads do not switch traffic to industries on the South Shore or from the South Shore to industries on their rails. (R., 23-24.)

There are three industries located on the South Shore line at Michigan City and about sixty on the lines of the other roads. Two of the South Shore industries compete with industries on the lines of the other roads. Officials of the South Shore industries testified that reciprocal switching arrangements between the South Shore and the other lines would be to their advantage, as they are now required to receive freight arriving via such lines at their team tracks or pay an additional switching charge. Six shippers located on the Monon, Michigan Central and Pere Marquette testified that they have used the South Shore for less-than-carload traffic and have received very efficient and expeditious service, in many instances superior to that of the steam roads. If reciprocal switching arrangements were in effect and the South Shore's carload service were as good as its less-than-carload service, they would divert a portion of their carload traffic from the steam lines to the South Shore. (R., 24-25)

The terminals of the appellants are open except to the South Shore. (R., 27)

The fact that the Lake Erie will be required, under reciprocal switching, to act as an intermediate carrier of traffic to and from the South Shore is an accident of location and not a transportation difference. In length of haul or use of intermediate line the situation of the South Shore with respect to the Michigan Central or the Monon clearly is not dissimilar from that of the Pere Marquette with respect to the Michigan Central or the Lake Erie. Nor is the fact controlling that three inter-

changes and a somewhat longer intermediate haul may be required on traffic to and from the Pere Marquette. Each defendant holds itself out to switch practically all traffic of each other defendant, regardless of the length of the switching haul or point of origin or destination of shipment. (R., 28)

There is no dispute as to the correctness of these findings or the adequacy of the evidence on which they rest. Indeed there could be none on this record as the evidence on which the Commission acted is not before the Court. *Louisiana & P. B. Ry. Co.* v. *U. S.* 257 U. S. 114, 116. The ultimate finding of unjust discrimination is as follows (R., 29):

> "We find that the refusal of defendants to switch interstate carload traffic moving over complainant's line to or from Michigan City, Ind., while contemporaneously switching interstate carload traffic for each other at that point, and the failure and refusal of the defendants to enter into arrangements for the performance of reciprocal switching of interstate carload traffic in connection with complainant upon relatively reasonable terms, based upon a careful consideration of the similarity of service and other conditions in connection with the service rendered each other at that point, so long as they contemporaneously participate in such arrangements with each other at that point, subjects complainant and its shippers to unjust discrimination and undue prejudice which will be ordered removed."

The findings summarized above fully support this ultimate finding. The dissimilarity of treatment, the similarity of circumstances and conditions, the competition for traffic between the South Shore and appellants, the competition for business between the shippers on the South Shore and those on appellants' lines, and the injury to the South Shore and its shippers resulting from the denial of equal facilities, all clearly appear and

are beyond dispute. Upon such a showing being made the Commission had the power and it was its duty to make the order here under attack. The order having been so made the courts will not substitute their judgment for that of the Commission as to the effect of the facts found.

In *Louisville & Nashville R. R. Co.* v. *U. S.* 238 U. S. 1, the same contention was advanced as that here made by appellants (p. 14):

> "* * * the case was submitted to the District Court not to pass on the facts but on the theory that though the conflicting evidence might sustain the finding, the *facts found* did not as matter of law sustain the order." (Italics the Court's.)

After reviewing at length the very elaborate and voluminous evidence which the report showed to have been before the Commission, the Court rejected the contention in the following language (p. 16):

> "The report in this case shows that the rate-making body had before it much and varied evidence of this character. After considering it as a whole, the Commission found that the $1-rate on coal shipped from the Kentucky mines to Nashville was unreasonable. *In the light of these findings we cannot say that the facts set out in the Report, do not support the order.* And since there is no contention, at this time, that the reduced rate is confiscatory, we can but repeat what was said in *Int. Com. Comm.* v. *Louis. & Nash. R. R.* 227 U. S. 88:
>
> > 'The pleadings charged that the new rates were unjust in themselves and by comparison with others. This was denied by the carrier. The Commission considered evidence and made findings relating to rates which the carrier insists had been compelled by competition, and were not a proper standard by which to measure those here involved. The value of such evidence necessarily varies according to the circumstances, *but the weight to be given it is peculiarly for the body experienced in such*

> *matters and familiar with the complexities, intricacies and history of rate-making in each section of the country.'* " (Italics ours.)

Thus, with respect to the effect of the *findings of fact* by the Commission, the Court applied the familiar rule with respect to the effect of the *evidence* before the Commission. The weight to be given to such findings, in the language of this Court, "is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies and history of rate making in each section of the country."

To the same effect is *Interstate Commerce Commission* v. *I. C. R. R. Co.* 215 U. S. 452. That case involved the validity of a finding that it was unjustly discriminatory for a carrier to furnish cars to a mine for loading its own fuel coal without counting them as a part of the mine's distributive share of all cars. In the course of the opinion this Court said (p. 477):

> "Conceding, for the sake of the argument, the existence of the preferences and discriminations charged, it is insisted, *when the findings made by the commission are taken into view* and the pleadings as an entirety are considered, it results that the discriminations and preferences arose from the fact that the railroad company chose to purchase its coal for its fuel supply from a particular mine or mines, and that, as it had a right to do so, *it is impossible, without destroying freedom of contract, to predicate illegal preferences or wrongful discriminations from the fact of purchase.*" (Italics ours.)

After full discussion of the effect of the order the Court rejected this contention, saying (p. 478):

> "Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the commission the power which has been lodged in that body *to consider complaints as to violations of the statute and to correct them if found to exist,* or attack as crude or in-

> expedient the action of the commission *in performance of the administrative functions vested in it,* and upon such assumption invoke the exercise of *unwarranted judicial power* to correct the assumed evils." (Italics ours.)

This decision makes it clear that the question of the effect of findings is one of fact and that with respect to that question the Court will not substitute its judgment for that of the Commission.

United States v. *I. C. R. R. Co.* 263 U. S. 515, involved the same question, as appears from the following language of the opinion (p. 521):

> "There is no claim that any one of the evidential facts found by the Commission and relied upon to show that the discrimination was unjust, is without adequate supporting evidence. *The argument is that these facts, even when supplemented by others appearing in the evidence, do not warrant the finding of the ultimate fact,* that the higher rates from Knoxo are unduly prejudicial to the Swift Lumber Company to the extent that they exceed the blanket basis of rates from Fernwood (the junction of the Illinois Central) and other points." (Italics ours.)

The Court disposed of this question as follows (p. 524):

> "Every factor urged by the carriers as justifying the higher rate from Knoxo appears to have been considered by the Commission. *How much weight shall be given to each must necessarily be left to it.*" (Italics ours.)

Additional authorities could readily be cited but we regard the foregoing as adequate for present purposes. They show conclusively that the judgment of the Commission as to the weight and effect of the facts found by it is conclusive.

As illustrating the application of this doctrine to cases involving orders requiring equal treatment of connections in the matter of switching, reference may be made

to *Seaboard Air Line Ry. Co.* v. *U. S.* 254 U. S. 57. The Court there upheld an order requiring carriers to remove the discrimination found to result from the absorption of switching on competitive traffic and the refusal to absorb it on noncompetitive traffic. The Court said (p. 62):

> "The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions, and that the exigencies of competition do not justify discrimnaton against shippers for substantially like services. *Moreover the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority.*" (Citing cases.) (Italics ours.)

See also *Pennsylvania Co.* v. *U. S.* 236 U. S. 351, and *Louisville & Nashville R. R. Co.* v. *U. S.* 238 U. S. 1.

2. THE DISCRIMINATION FOUND BY THE COMMISSION IS UNLAWFUL AND IS DIRECTLY ATTRIBUTABLE TO THE APPELLANTS.

(a) There is direct contact between the common carrier operations of appellants and those of the South Shore.

The fourth, fifth and sixth assignments of error rest on the proposition that the lack of a direct physical connection between the *rails* of the Pere Marquette, the Monon or the Michigan Central on the one hand and the South Shore on the other precludes, as a matter of law, a finding of unjust discrimination on the part of the former as against the latter. We deny this proposition and assert that the discrimination found is unlawful and is attributable to the appellants.

The physical situation which gives rise to this contention by appellants is depicted in the diagram on page 2, *supra,* and is described in the report of the Commission as follows (R., 22):

> "At Michigan City the South Shore has a connection and interchange facilities with the Lake Erie & Western. The Lake Erie & Western also connects directly with the Monon and the Michigan Central. The Monon connects with the Pere Marquette, Lake Erie & Western, and Michigan Central, and acts as an intermediate line for the interchange of freight between points on the Pere Marquette on the one hand and points on the Lake Erie & Western and the Michigan Central on the other. The Lake Erie & Western and Michigan Central do not connect with the Pere Marquette, and the Michigan Central, Pere Marquette, and Monon do not connect with the South Shore."

Whether such a situation would furnish any basis for an order requiring the Pere Marquette, Michigan Central and Monon to enter into arrangements with the South Shore for reciprocal switching and absorption of switching charges *as an original matter and in the absence of such arrangements among themselves and with the Lake Erie* need not be considered. The whole basis for the order is the maintenance of such arrangements among themselves and the denial of equality of treatment in refusing to extend them to the South Shore upon similar terms, and the only thing required by the order is the granting of such equality. The reciprocal switching and absorption arrangements among appellants are described in the Commission's opinion herein (R., 23-34). They have the effect of bringing each of the appellants, as a matter of law, into physical contact with the South Shore. This is so because each of the appellants absorbs the switching charges applicable to movements between its rails

and points on the Lake Erie's terminals, and the Lake Erie's terminals are physically connected with the South Shore. Indeed the appellants will absorb such charges on cars destined to or from the plants of the Perfection Cooler Company and the Steel Fabricating Company on the Lake Erie, to reach which they must pass over the very switch points of the connection between the Lake Erie and the South Shore. (See map, R., 30.)

On inbound cars to Lake Erie deliveries the road-haul carrier, which absorbs the Lake Erie's switching charges, becomes the delivering line, and assumes, as between it and the Lake Erie, responsibility for the giving of notice of arrival, the collection of freight, the settlement of claims, and other matters arising between carrier and consignee. Similarly, on outbound cars from Lake Erie industries, the road-haul carrier, which absorbs the Lake Erie's switching charges, becomes the initial line, and assumes, as between it and the Lake Erie, responsibility for executing the bill of lading, and other matters arising between carrier and shipper. In other words the Lake Erie and any other necessary switching lines are, under the tariffs, the common carrier agents of the line-haul carrier to commence or complete transportation which the latter has undertaken but is not in a position to perform completely itself.

It matters not that this extension of service to the South Shore switch is accomplished by employment of an independent carrier. The controlling fact is that the service is, under the tariffs, that of the line-haul carrier, and referable to him. He could perform it in any one of a number of ways: by leasing and operating a track; by acquiring trackage rights and operating over such tracks; or (as here) by delivery to another carrier whom

he finds ready equipped to do the work at such other carrier's lawful tariff rates.

The same result is brought about in another way. The Lake Erie switches for the South Shore and the latter absorbs its charges. (R., 24) It results from this, for the reasons elaborated above, that the South Shore, *through its agent, the Lake Erie,* is in direct physical contact with the Michigan Central and the Monon; and the Pere Marquette, through its agent the Monon, is in contact with the South Shore's agent, the Lake Erie.

These propositions find full support in the decisions of the courts, in the decisions of the Commission and in the administration of the Statute by the Commission. The most recent pronouncement on the subject is the decision of this Court in *Missouri Pacific R. R. Co.* v. *Reynolds-Davis,* 268 U. S. 366. The Missouri Pacific was sued for loss of part of a carload of sugar which had been shipped on a through bill of lading from Raceland, La., to Fort Smith, Ark. The loss occurred in Fort Smith while the car was in possession of the St. Louis-San Francisco Railroad, which had been employed by the Missouri Pacific to switch the car to the consignee's plant, which was on the switching carrier's line. In holding the Missouri Pacific liable the Court said (p. 368):

> "The joint through rate covered delivery at the warehouse of the consignee. The bill of lading named Morgan's Louisiana & Texas Railroad and Steamship Company as initial carrier and the route designated therein named the Missouri Pacific as the last of the connecting carriers. Its lines enter Fort Smith but do not extend to the consignee's warehouse. *It employed the Saint Louis-San Francisco to perform the necessary switching service. And it paid therefor* $6.30, *the charge fixed by the tariff on file with the Interstate Commerce Commission. The switching carrier was not named in the*

bill of lading and did not receive any part of the joint through rate. It was simply the agent of the Missouri Pacific for the purpose of delivery." (Italics ours.)

The cases in the state courts are to the same effect. In *Shapiro* v. *B. & M. R. R. Co.* 213 Mass. 70, plaintiff sued for partial loss of a car of oats, shipped from Kentland, Ind., and delivered to the defendant at Mechanicsville, N. Y., whence it was hauled by that carrier to Worcester, Mass., the destination. At Worcester the defendant delivered the car to the Boston & Albany Railroad and the latter switched it to its freight yard where the plaintiff unloaded it and discovered the loss. In holding the defendant liable the Court said:

> "If these facts were found by the jury, the defendant did not deliver the oats to the Boston & Albany Railroad, to be delivered by it as the last carrier to the consignee, *but did itself, as the last carrier, deliver them to the consignee, employing the Boston & Albany as its agent to haul the car to the Boston & Albany freight yard, and hiring the use of that yard as its yard for the delivery of these oats.*" (Italics ours.)

The doctrine was likewise applied in *St. Louis S. W. Ry. Co.* v. *Jackson,* 55 Tex. Civ. App. 407, and *Western Atlantic Ry. Co.* v. *Exposition Cotton Mills,* 81 Ga. 522. See also *United States* v. *U. P. R. R. Co.* 213 Fed. 332.

The Commission has expressed the same view. In *Manufacturers Ry. Co.* v. *St. L. I. M. & S. Ry. Co.* 28 I. C. C. 93, a case involving the question of equality of treatment of terminal lines in the matter of switching absorption, it said (p. 101):

> "There is evidently much confusion in the minds of complainants as to the true character of these allowances and the services for which rendered. Sometimes, for competitive or other reasons, a trunk line will absorb the charge of a connecting terminal line for gathering freight originating on

the latter to the rails of the trunk line. *Manifestly such service of the terminal line is one performed for the trunk line and not for the shipper,* and should be paid for by the trunk line and not by the shipper. * * * We are speaking now of a terminal line which is in all respects a carrier subject to the act." (Italics ours.)

Moreover, in its administration of the Act the Commission has made orders in other cases on identical states of fact similar to that here in question. That is to say it has required carriers to accord to connections with which they had no direct contact switching arrangements similar to those accorded direct connections.

In *National Spring & Wire Co.* v. *Director General,* 60 I. C. C. 564, the Commission found that the refusal of the five steam railroads serving Grand Rapids, Michigan, to absorb the switching charges of the Michigan Railroad, an electric line also serving that point, constituted unjust discrimination, and made an order requiring them to desist therefrom. The electric line connected directly with only one of the steam lines, while all of the steam lines connected directly with one another, so that switching between four of the steam lines and the electric line involved an intermediate switching movement, while that was not true as among the steam lines themselves. The Commission nevertheless found, just as they did here, that the circumstances and conditions were substantially similar. The practical construction by an administration branch of the Government of a statute with the enforcement of which it is charged is entitled to special weight. Indeed this Court has held that such construction is binding, at least until Congress has altered it by legislation. *New York, New Haven and Hartford R. R. Co.* v. *I. C. C.* 200 U. S. 361. The Court there said (p. 401):

"* * * *we concede that the interpretation given*

by the Commission in those cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least until Congress has legislated on the subject. We make this concession, because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute." (Italics ours.)

Upon the foregoing authorities we respectfully insist that all of the appellants are in direct contact with the South Shore and accordingly owe it the duty of equal treatment under the Statute. The fallacy in appellants' contention on this point lies in the fact that they make it turn on the lack of a direct connection of the "rails," meaning the steel itself. That is wholly foreign to the problem. If the point has any validity at all it must rest on the presence or absence of contact between the *common carrier operations* of appellants and the South Shore. As we have shown such contact exists, not only by virtue of appellants' absorption of the Lake Erie switching charges but also by virtue of the South Shore's absorption of the Lake Erie's switching charges. Plainly the discrimination found by the Commission is unlawful and is directly attributable to appellants.

The cases cited and relied on by appellants in support of the contrary view do not sustain it. *St. Louis S. W. R. R. Co.* v. *U. S.* 245 U. S. 136, is directly contra, as is clear from the passage quoted in appellants' own brief (p. 33). The Court said (p. 144):

"Carriers insist also that the order is void on the ground that, since their 'rails do not reach Padu-

cah, they cannot be guilty of discrimination against that city.' *They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination.''* (Italics ours.)

Similarly here appellants' rails do not reach the South Shore but they bill traffic from and to points on the Lake Erie, including points beyond the Lake Erie's connection with the South Shore, absorbing the charges of the Lake Erie for originating or delivering it, "and thereby they become effective instruments of discrimination."

That case necessarily overruled *St. Louis, Iron Mountain & Southern Ry. Co.* v. *U. S.* 217 Fed. 80, as the order of the Commission which was set aside by the District Court in the latter case was identical with that which was upheld by this Court in the former. This is clear from the Commission's statement in *Metropolis Commercial Club* v. *I. C. R. R. Co.,* 30 I. C. C. 40, 41, wherein the order was made which was set aside by the District Court in the *St. Louis Iron Mountain & Southern case,* to the effect that it involved the same rate structure, was based on the same facts and raised the same issues as *Paducah Bd. of Trade* v. *I. C. R. R. Co.* 29 I. C. C. 583, which, with the later decision in *Paducah Bd. of Trade* v. *I. C. R. R. Co.* 37 I. C. C. 719, was the basis for the order which was upheld by this Court in the *St. Louis Southwestern case.*

Central R. R. Company v. *U. S.* 257 U. S. 247, involved a wholly dissimilar state of facts from that presented in the case at bar. There the Commission had found that the refusal of the appellant carriers to grant a transit privilege at Newark, New Jersey, while participating in joint rates from the South in connection with which their southern connections granted a transit privilege, constituted unlawful discrimination and ordered them to cease

and desist therefrom. After pointing out that a finding that discrimination is unjust is ordinarily a finding of fact this Court said (p. 256):

> "But the question presented here is whether the discrimination found can be held in law to be attributable to the appellants, and whether they can be required to cancel existing joint rates, unless it is removed. No finding made by the Commission can prevent the review of such questions. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *Philadelphia & Reading Ry. Co.* v. *United States*, 240 U. S. 334."

The ground of the decision was not that the appellants did not reach the southern points where transit was granted *but that they did not grant the transit at those points.* This is clear from the following language quoted and relied on by appellants (p. 259):

> "But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination *only if each carrier has participated in some way in that which causes the unjust discrimination,* as where a lower joint rate is given to one locality than to another similarly situated." (Italics ours.)

These principles have no application here. The appellants all participate in the unjust discrimination by refusing to grant reciprocal switching to the South Shore although they have granted it to one another. They are in a position either to grant it to the South Shore or withdraw it from one another and consequently they are properly held responsible for it.

(b) In the absence of direct contact between the common carrier operations of appellants and those of the South Shore, the Commission could make a valid order requiring equality of treatment.

Even if there were no direct contact between appellants' common carrier operations and those of the South Shore it would be within the Commission's administrative power, on a proper showing, to find unlawful discrimination and require its removal. The extension of service to some and the refusal to extend it to others similarly circumstanced, *although the latter are beyond physical range of the carrier's operations,* may constitute unjust discrimination and an order to cease and desist therefrom is valid. Just such an order was upheld in *United States* v. *P. R. R. Co.* 266 U. S. 191. The Commission had condemned as unjustly discriminatory the acts of the Pennsylvania and Western Maryland Railroad in granting one another trackage rights within a portion of the City of York, Pa., so that shippers on that part of the line of each could make use of the lines of both, while refusing to grant such rights in the remainder of the city. The contention advanced by appellants here was vigorously pressed in this Court and was stated thus in the Court's opinion (p. 197):

> "The argument most strongly urged is this: In the absence of an appropriate order carriers are not obliged to extend or curtail their facilities; or to submit to enlarged use of their terminals. The arrangement by which the Pennsylvania and the Western Maryland extend, each to the other, the use of their tracks to effect terminal receipt and delivery of carload freight within the zone is a trackage agreement and is, in law, either a limited extension of the line of each carrier or an agreement for the limited common use by each carrier of terminal facilities of the other. *To accord to plants without the zone the same service which, under the arrangement, is enjoyed by those within the zone would involve either a further*

extension of the tracks of each carrier or an enlargement of the common use of their terminal facilities. Under the Interstate Commerce Act, as amended by Transportation Act, c. 91, 41 Stat. 456, the Commission might, upon proper findings and conditions, have ordered such extension of tracks, under the powers conferred by Sec. 1, par. 21, p. 478; or it might have ordered an enlargement of the common use of terminals under Sec. 3, par. 4, p. 479; or it might have equalized rates and charges for plants within and without the zone by exercise of the power, conferred by sec. 15, pars. 3 and 4 pp. 485, 486, to establish through routes and joint rates. The grant of these specific powers indicates a purpose on the part of Congress to so restrict the Commission's general power to prevent unjust discrimination, prohibited by Sec. 3, *that a preference granted certain shippers served by a carrier by virtue of the ownership of tracks or trackage rights over other shippers not reached by the carrier, because it does not own tracks or trackage rights which would enable it to reach them, cannot warrant a finding of undue discrimination;* and that similarly the withholding or possession of trackage rights between carriers cannot, in law, constitute undue preference." (Italics ours.)

However this contention did not prevail. The Court rejected it in the following language (p. 199):

"The argument is, in our opinion, unsound. There is nothing in the Act to Regulate Commerce, as originally enacted, or in Transportation Act, 1920, or in any earlier amendment, which indicates a purpose on the part of Congress either to allow a carrier to create undue prejudice by the use of facilities possessed, or to narrow the Commission's powers to prevent unjust discrimination. * * *

"The Commission has found, not merely that the facilities in question were granted to some and refused to others, *but that the grant and refusal have, by reason of the use made and intended to be made of the facilities, resulted in undue prejudice.* It is true that an extension of trackage rights, an enlarged common use of terminals, or the establishment of through routes and joint rates, or the with-

drawal of any of them, could not be ordered except upon the findings and conditions prescribed in the act. But the order complained of does not require any such thing. It requires only that the carriers shall desist from a practice which involves such use as has resulted and will result in the undue prejudice found. The order leaves them free to remove the discrimination by any appropriate action." (Italics ours.)

The Pennsylvania had extended its line to certain Western Maryland shippers by securing trackage over the Western Maryland. It had refused to extend its line in a similar manner to other Western Maryland shippers. In like manner the Western Maryland had extended its line to certain Pennsylvania shippers by securing trackage over the Pennsylvania but had refused to extend it to others in a similar manner. *Each company was held guilty of unjust discrimination as between shippers which it did reach and serve and shippers which it did not reach or serve.* Clearly direct contact between the carrier complained of under Section 3 and the party complaining is wholly unnecessary to establish a violation of that section.

(c) The alleged lack of reciprocity in the extent of terminal facilities and other similar matters does not constitute a differentiating circumstance negativing discrimination.

Appellants faintly urge that the alleged lack of reciprocity between themselves and the South Shore in the extent of terminal facilities, number of freight cars, number of industries served, extent of reciprocal services elsewhere, and amount of business originated and delivered, constitutes such a dissimilarity of circumstances as to negative unjust discrimination and render the order unlawful. This contention is based on the view that, inasmuch as appellants control a greater volume of traffic

than the South Shore, they are justified in entering into reciprocal switching arrangements with one another while declining to do so with it. The question has been directly passed on by this Court and the contention rejected without qualification. *Pennsylvania Co.* v. *United States*, 236 U. S. 351. The Court said (p. 364):

> "*That there is no discrimination in fact is rested upon the argument that with the other three roads the Pennsylvania Railroad has certain reciprocal arrangements in the Mahoning and Shenango Valleys, by which these three roads interchange cars with the Pennsylvania Railroad. It is contended that this, more than the $2.00 per car, is the real inducement for the treatment of those railroads.* But, as the Commission found, the amount of traffic exchanged between these three railroads is of a varying and differing quantity, and to ascertain the value of such service to the Pennsylvania Railroad would be a futile undertaking, involving uncertain and speculative considerations as to the value of this and that service and the varying cost of performing such service at remote and different places. The statements in the record, presented to the Commission by the Pennsylvania Company, show the great difference in service of this character rendered by the three railroads and by the Pennsylvania Company for the different roads. For instance, it is shown that during 1911 the Baltimore & Ohio switched for the Pennsylvania 69 cars at New Castle, and in the Valleys generally 4,185 cars, while the Pennsylvania Company switched for the Baltimore & Ohio 8,286 cars in New Castle, and in the Valleys generally 8,900 cars. The Rochester Company switched for the Pennsylvania in the same year 406 cars in New Castle and 3,661 cars to points adjacent thereto. The Rochester Company moved for the Pennsylvania Company in New Castle 337 cars more than did the Baltimore & Ohio, and in gross totals, through and into adjacent regions, 187 cars less. The Pennsylvania Company moved nearly twice as many cars for the Baltimore & Ohio road as the Baltimore & Ohio did for it. The Government therefore contends with much force that such reciprocal switching ar-

rangements ought not to justify giving cars shipped over the Baltimore & Ohio Railroad a preference denied the cars shipped over the lines of the Rochester road, which cars enter New Castle on the same track and reach the same junction points. And as we have said the question of compensation is not here involved, and what compensation the Pennsylvania Company might require from the Rochester Company is not now to be determined. *We agree with the Commission and the court below that the alleged reciprocal shipping arrangements do not remove the discriminatory character of the treatment of the Rochester road.*" (Italics ours)

In the recent case of *United States* v. *Illinois Central R. R. Co.* 263 U. S. 515, the same question was presented to this Court in a somewhat different form. It appeared in that case that the Illinois Central blanketed large territories along its line south of Jackson, Mississippi, to the Gulf of Mexico and from the Mississippi River into Alabama, and applied one rate on all shipments of lumber moving to and north of the Ohio River, with the single exception of a station called Knoxo on the line of the Fernwood & Gulf R. R. Co. From this point the Illinois Central charged its own line-haul rate plus the local rate of the Fernwood & Gulf from the point of origin to its junction with the Illinois Central. The Illinois Central attempted to justify its discriminatory treatment of Knoxo on the ground that the traffic coming from the Fernwood & Gulf was noncompetitive while that from other points where the rate was blanketed was competitive, and that its refusal to blanket the rate from Knoxo was in the interest of the preservation of its own revenue and was justified by controlling differences in circumstances. With respect to this contention the Court said (p. 523):

"The effort of a carrier to obtain more business, and to retain that which it has secured, proceeds from a motive of self-interest which is recognized

> as legitimate, and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of favoritism or malice. But preferences may inflict undue prejudice, though the carrier's motives in granting them are honest. *Interstate Commerce Commission* v. *C. G. W. Ry. Co.*, 209 U. S. 108, 122. Self-interest of the carrier may not override the requirement of equality in rates."

It is thus clear that the theory of reciprocity, or self-interest, cannot prevail. Such considerations do not justify discrimination in rates or services.

(d) The discrimination practiced by appellants is a source of advantage to them and their shippers and of disadvantage to the South Shore and its shippers, and the Commission so found.

Appellants also suggest that the discrimination practiced by them is not undue under the rule that the prejudice to one party is not a source of advantage to the other. Without conceding this rule to be of universal application we desire to point out that the Commission's finding refutes appellants' suggestion and renders the rule inapplicable. The South Shore industries compete with those on the lines of appellants (R., 24); it would be to their advantage if the South Shore had reciprocal switching arrangements with appellants (R., 24-25); under present arrangements they are required to receive traffic transported to Michigan City by appellants on the latters' team tracks and in some instances they have been required to pay additional switching charges (R., 25); if reciprocal switching arrangements were in effect and if the South Shore's carload service were as good as its less-than-carload, shippers on appellants' lines would divert business to the South Shore (R., 25). Obviously the handicap under which the South Shore now labors in competing with appellants for the traffic of Michigan City shippers is a source of advantage to appellants, as

it permits them to retain traffic which they would otherwise lose to the South Shore on account of its superior service. Similarly the handicap under which South Shore shippers now labor in having to haul or pay extra switching on freight arriving via appellants' lines is a source of advantage to appellants' shippers as the latter receive their freight without such extra charges and sell the same in competition with the South Shore shippers. Obviously also the withdrawal of reciprocal switching among appellants would do away with these advantages and disadvantages as all shippers would then have to haul their freight to and from the freight houses of roads on which they are not located and all roads would have to compete on an equality for the business of shippers not located on their own lines.

III.

THE ORDER OF THE COMMISSION DOES NOT DEPRIVE APPELLANTS OF ANY OF THEIR CONSTITUTIONAL RIGHTS.

Appellants assert in their third assignment of error that the order deprives them of their property without due process of law in violation of the Constitution. In support of this appellants state, in effect, that they cannot comply with the order except by interchanging freight with the South Shore under similar conditions as they interchange with each other and that, consequently, some of the traffic they would otherwise secure will go to the South Shore. This contention is unsound because it rests upon an assumption which is contrary to fact. Appellants are not required by this order or by other order or circumstance to continue the maintenance of these arrangements among themselves and to extend them to the South Shore. In the language of this Court in *United States* v. *Pennsylvania R. R. Co.*, 266 U. S. 191, 199, "the

order complained of does not require any such thing. It requires only that the carriers shall desist from a practice which involves such use as has resulted and will result in the undue prejudice found. The order leaves them free to remove the discrimination by any appropriate method."

The only circumstance which appellants rely upon in their brief as establishing their alleged inability to comply with the order by ceasing to interchange traffic among themselves is that to do so would be contrary to public interest and necessity. The Commission did not so find and there is nothing in the record here in support of appellants' assertion. Therefore there is no legal requirement that appellants continue to interchange among themselves in the manner described in the Commission's report and obviously appellants' mere opinion that a cessation of such interchange practices among themselves would be contrary to public interest or necessity does not demonstrate their inability or lack of right to discontinue such practices.

But even if, in compliance with the order, appellants accord the same treatment to the South Shore as they now do to themselves and consequently divide their traffic with the South Shore they are not thereby deprived of any constitutional right. Appellants' position, in substance, is that they, four competing carriers, may voluntarily maintain reciprocal switching arrangements among themselves, thus putting themselves in a position where each of them may deprive another of the competitive traffic which it might otherwise have retained, thereby dividing the traffic among themselves, but that they cannot be required, under Section 3 of the Interstate Commerce Act, to admit a fifth competing carrier (The South Shore) to such arrangements on a similar basis, because

they have a constitutional right to all of that traffic and to freedom from the competition of the fifth carrier for some of it upon the same conditions as they compete for it among themselves, even though their conduct unduly prejudices that fifth carrier and denies it that equality of treatment which it is the fundamental purpose of the Interstate Commerce Act to secure to all in like circumstances. This position is unsound.

> "The effort of a carrier to obtain more business, and to retain that which it had secured, proceeds from the motive of self-interest which is recognized as legitimate; and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of favoritism or malice. But preferences may inflict undue prejudice though the carrier's motives in granting them are honest. *Interstate Commerce Commission* v. *Chicago Great Western Ry. Co.*, 209 U. S. 108, 122. Self-interest of the carrier may not override the requirement of equality in rates." (*United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 523.)

That there is no constitutional right such as appellants claim is also shown by the following decisions of this Court: *Chicago Junction Case*, 264 U. S. 258, 267; *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 437-438; *Edward Hines Trustees* v. *U. S.* 263 U. S. 143, 148; *Wisconsin, etc. R'd Co.* v. *Jacobson*, 179 U. S. 287, 300.

As supporting their contention appellants cite *Louisville & Nashville R. R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 132. The facts of that case are wholly unlike those presented in the case at bar and the decision is not applicable here. That case was not concerned with the removal of any unlawful discrimination but the question before the court was whether the Louisville & Nashville could be required, under a Kentucky statute, *irrespective of any unlawful discrimination*, to receive at its connection with another carrier and to switch, transport and deliver freight consigned from a point on the other

carrier's line to a point on the line of the Louisville & Nashville. As this Court said in *Grand Trunk Ry.* v. *Michigan Ry. Comm.*, 231 U. S. 457 at page 472 and again in *Pennsylvania Co.* v. *United States*, 236 U. S. 351 at page 371:

> "the case turned upon the point that the roads were competitive and the point of delivery an arbitrary one and that thereby the terminal station of one company was required to be shared with the other."

But the case at bar is not one in which appellants have been required to give the use of their terminal facilities to the South Shore. In its report (R., 27) the Commission said:

> "Our powers under paragraph (4) of section 3 of the interstate commerce act to require the joint use of terminals are not here invoked."

Here the Commission found that appellants' practices, which they voluntarily instituted and maintained among themselves, denied to the South Shore that equality of treatment to which it was entitled under the Interstate Commerce Act. The order merely requires appellants to remove the unlawful discrimination in some appropriate manner. These circumstances completely differentiate the case at bar from the *Central Stock Yards case* and show that the principles of law applied there are inapplicable here.

The cases cited on page 48 of appellants' brief (*Chicago, Indianapolis & Louisville Ry. Co.* v. *Public Service Commission*, 188 Ind. 334 and *Indiana Harbor Belt R. R. Co.* v. *Public Service Commission*, 187 Ind. 660) are also inapplicable here. In the first case cited the court decided that an order of the Indiana Public Service Commission directing the construction of an interchange track connecting two lines of railroad for the transfer of freight between them was invalid because it was not supported

by any substantial evidence of public necessity for the connection. In the other case the court similarly held that an order of the Indiana Commission requiring two carriers to establish joint through rates between all points on their lines in Indiana was invalid because there was no evidence before the Commission that there was any public necessity for such rates. In each case the court stated that a showing of public necessity was the test of the legality of the order. These cases involved only questions of local law governing the statutory powers of the Indiana Commission over intrastate traffic. In neither case was any constitutional question decided *nor was any question of unlawful discrimination presented.* It may be noted, however, that in the first case cited the Indiana Supreme Court said (188 Ind. p. 339) that "such an order (for an interchange track) will not be denied because it may have the effect of affording facilities which will be of advantage to one of the companies interested in securing business which would otherwise be handled by another company."

In view of the facts surrounding this case and the authorities we think it is clear that the order complained of does not deprive appellants of any of their constitutional rights.

IV.

APPELLANTS' ASSIGNMENTS OF ERROR AND ARGUMENT WITH RESPECT TO THE COMMISSION'S JURISDICTION OVER THE SOUTH SHORE AND THE SOUTH SHORE'S STATUS AS A COMMON CARRIER UNDER PARAGRAPH (3) OF SECTION 15 ARE IRRELEVANT AND UNSOUND.

Appellants contend that the validity of the Commission's order depends upon whether the Commission has jurisdiction over the South Shore under the provisions of paragraph (3) of Section 15 of the Interstate Commerce Act and that in order to entitle it to the relief granted by the Commission the South Shore was bound to show that it was not excepted by the provisions of said paragraph (3) from the power thereby conferred upon the Commission. That contention and the assignments of error it relates to are wholly irrelevant because the question of the Commission's jurisdiction under paragraph (3) of Section 15 is not now and never has been in this case.

Paragraph (3) of Section 15 empowers the Commission to establish through routes, joint rates, and operating conditions applicable to through routes between carriers, except "between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character." The Commission's powers under this paragraph were not invoked and were not exercised. The South Shore did not ask for the establishment of through routes and joint rates and the order did not direct their establishment.

The right which the South Shore sought to enforce by this proceeding was its fundamental right to equality of treatment under the provisions of Section 3. See

Chicago Junction Case, 264 U. S. 258, 267. That right is wholly independent of the provisions of paragraph (3) of Section 15, and it is by virtue of its powers under Section 3 that the Commission made its order, which obviously does not establish through routes or joint rates or operating conditions for through routes. The order is solely a Section 3 order and its only requirement is that the unlawful discrimination against the South Shore be removed.

A contention similar to that made by appellants was made in *Louisville & Nashville R. R. Co.* v. *United States,* 238 U. S. 1, the offending carriers contending that the Commission's order requiring them to switch all traffic for the Tennessee Central compelled the establishment of through routes and joint rates. This Court disposed of that contention in the following language which is applicable with equal force in this case (page 18):

> "These objections treat the order as being broader than its terms. The Commission did not * * * direct the Appellants to establish a joint rate and a through route with the Tennessee Central * * * but only required them to render to the latter the same service that each of the Appellants furnishes the other in switching cars to industries located in and near the Yard."

The difference between orders establishing joint rates and through routes and orders requiring the removal of unjust discrimination has also been recognized by this Court in *Pennsylvania Co.* v. *United States,* 236 U. S. 351, at page 358. See also *Manufacturers Ry. Co.* v. *St. L. I. M. & S. Ry. Co.* 28 I. C. C. 93, 103, for a discussion of the distinction between switching absorptions and through routes and joint rates.

Since the powers conferred upon the Commission by paragraph (3) of Section 15 were not invoked or exer-

cised in this case, it clearly was not necessary for the South Shore to make any showing as to the Commission's jurisdiction over it under the provisions of that paragraph. Appellants' assignments of error and argument proceeding from their false premise to the contrary are therefore irrelevant and there is no occasion to consider in this case the question they thus seek to raise.

Notwithstanding the immateriality of any question of the Commission's jurisdiction under paragraph (3) of Section 15, we wish to call to the Court's attention that it has been repeatedly determined by the Commission that the South Shore is a common carrier by railroad and is engaged in the general transportation of freight.(*) The Commission's report (R., 22, 27) shows that there was evidence before it in this case that the status of the South Shore had not changed since those earlier cases and that there was no evidence before the Commission to refute its earlier determinations. Those determinations were adhered to by the Commission in this case and they cannot be assailed here because the evidence before the Commission (and the report shows that there was evidence) is not before the Court. *Louisiana & P. B. Ry. Co.* v. *United States*, 257 U. S. 114, 116. The determination and the facts stated by the Commission in its report establish the fact that the South Shore "is engaged in the general business of transporting freight in addition to (its) passenger and express business." Moreover the general question of the Commission's jurisdiction over interurban electric lines is foreclosed by *United States* v. *Village of Hubbard*, 266 U. S. 474. Consequently, even if the order in this case had established through routes and joint rates, it would not

C. L. S. & S. B. Ry. Co. v. Director General, 58 I. C. C. 647; *Indiana Passenger Fares of C. L. S. & S. B. Ry. Co.* 69 I. C. C. 180.

be subject to attack upon the ground that the Commission did not have jurisdiction over the South Shore for that purpose. Appellants' assignments of error and arguments on this question therefore are not only irrelevant but unsound and contrary to the Commission's conclusions which are supported by substantial evidence.

CONCLUSION.

We have discussed all of the appellants' assignments of error except the first and second, and have shown that they are without validity. The first two assignments are general and require no separate consideration. They must fall with the others. The Commission's order is clearly within its statutory power and does not invade appellants' constitutional rights. The judgment of the District Court should be affirmed.

Respectfully submitted,

ERNEST S. BALLARD,
RUSH C. BUTLER,
WILLIAM E. LAMB,
JAMES DALE THOM,
Solicitors for The Chicago, Lake Shore & South Bend Railway Company.